

EXECUTIVE OVERREACH IN DOMESTIC AFFAIRS (PART I)—HEALTH CARE AND IMMIGRATION

HEARING BEFORE THE EXECUTIVE OVERREACH TASK FORCE OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTEENTH CONGRESS SECOND SESSION

MARCH 15, 2016

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EXECUTIVE OVERREACH IN DOMESTIC AFFAIRS (PART I)—HEALTH CARE AND IMMIGRATION

TUESDAY, MARCH 15, 2016

HOUSE OF REPRESENTATIVES
EXECUTIVE OVERREACH TASK FORCE
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Task Force met, pursuant to call, at 10:08 a.m., in room 2141, Rayburn House Office Building, the Honorable Steve King (Chairman of the Task Force) presiding.

Present: Representatives King, Goodlatte, Issa, Gohmert, Jordan, Poe, Gowdy, Labrador, DeSantis, Buck, Bishop, Cohen, Conyers, Lofgren, Jackson Lee, Johnson, Chu, and Peters.

Staff Present: (Majority) Paul Taylor, Chief Counsel; Tricia White, Clerk; Zachary Somers, Parliamentarian & General Counsel, Committee on the Judiciary; (Minority) James J. Park, Minority Counsel; Gary Merson, Counsel; and Rosalind Jackson, Professional Staff Member.

Mr. KING. The Executive Overreach Task Force will come to order. And without objection, the Chair is authorized to declare a recess of the Task Force at any time. I'll recognize myself for an opening statement.

At our first Task Force hearing, we explored how Congress itself, over the past many decades, has acted—or not acted—in ways that have tended to cede its legislative power to the executive branch. It's contrary to our Founders' original intentions as well. Our hearing today focuses on examples in which the President has exercised sheer will to wrest legislative authority from Congress.

President Obama's actions in planning to grant amnesty and work permits to millions of illegal immigrants, without congressional authorization, and in unilaterally extending statutory ObamaCare deadlines and spending unappropriated funds to pay subsidies to health insurers, are two case studies in the modern abuse of domestic executive power.

While the President has defined constitutional powers in foreign and military affairs, he does not have any legislative power under the Constitution. It's not outside his power to veto legislation presented to him.

Consequently, Presidential abuses of power in domestic affairs are particularly grave threats to the individual liberty protected by the Constitution. I'll focus on the example of immigration in my remarks.

Beginning on March 2, 2011, the Obama administration began a series of memos that have radically transformed immigration law without a single vote from Congress. March 2 was the first of what were called the Morton memos.

I recall reading the Morton memos, and I recall its discussion and hearing here with Janet Napolitano. I remember her description of prosecutorial discretion. And I recall that they said in some of the memos on an individual basis only, but repeated something like seven times in one memo. But President Obama's theory that prosecutorial discretion, which always previously was applicable only on a case-by-case basis, could be categorical in application. In other words, by groups.

I successfully offered an appropriations amendment to block funding of the Morton memos on June 7, 2012. But not to be deterred, the President went further, 8 days later, on June 15, 2012, with the creation of the Deferred Action for Childhood Arrivals, or known as DACA.

DACA took an even more radical step for the Obama administration's destruction of the traditional understanding of prosecutorial discretion. With DACA, the President claimed prosecutorial discretion not only was categorically applicable, but further, there should be benefits conferred.

Prosecutorial discretion was always understood to be both individualized, on a case-by-case basis, and simply a decision to not act. DACA completely changed that with an entire program created to process people for positive benefits as opposed to simply refraining from action by the government. I also offered a successful amendment to strip funds from DACA and the Morton memos on June 5, 2013.

In November of 2014, President Obama unilaterally and unconstitutionally created a program that would suspend immigration laws for potentially over 5 million people who are in this country illegally. The President could have urged Congress to enact a statute to create such a program under law, but he did not do so. Even when his party controlled both houses of Congress, he did not do so. And despite claiming the situation is urgent, the President didn't act unilaterally until November 20, 2014.

Whether or not the President delayed action until November of 2014 for political reasons, he knew the actions he ultimately did take are unconstitutional. In particular, the President said publicly, and I quote: "What I have been able to do is make a legal argument, which is that, given the resources we have, what we can do is then carve out the DREAM Act folks, but if we start broadening that to DACA, for example, then essentially I would be ignoring the law in a way that I think would be very difficult to defend it legally."

Putting aside the legality of the President's unilateral action regarding DREAM Act folks, clearly, the President's statement regarding the illegality of expanding on that program was true then, and it is true today. As The Washington Post's own Fact Checker

wrote recently, referring to the very same quote: “It’s clear from the interviews that the President was being asked about specific actions that ended deportations of a subset of illegal immigrants,” which is precisely the type of action he took in November. And as The Washington Post’s Fact Checker concluded: “Previously, the President said that was not possible, using evocative language that he is not a king or the emperor. Apparently, he has changed his mind.”

And, indeed, a week after he announced his immigration law suspension program, President Obama announced in his own words: “The fact that I just took an action to change the law.” I think that took place in Chicago.

The President claims the concept of prosecutorial discretion allows him to permit at least 5 million people who are here illegally to cut in line, to stay here under suspension of the immigration laws by bypassing the legal process that’s being used by millions of people, and with great financial expense to them under the law.

That number, 5 million people, is staggering, and under its weight the concept of prosecutorial discretion, which is intended to encompass individual, case-by-case determinations, flattens to nothing. The 5 million people for whom President Obama wanted the immigration law suspended, plus the 600,000 or so provided amnesty under DACA, constitute nearly 50 percent of the size of the entire unauthorized immigrant population in the United States.

Further, the number of people for whom the immigration laws would be unilaterally suspended by the President’s actions is larger than the roughly 4.2 million people today who are family members of U.S. citizens and permanent residents who have paid thousands of dollars for approved green card petitions and who are currently waiting for their green cards to become available.

Under the President’s unilateral action, more people would be allowed to essentially cut in line for work authorization than are currently—and legally—waiting in line for such authorization, because the resources that would normally be devoted to processing legal applicants would be diverted to processing illegal applicants. That’s a shocking abuse of executive power.

I look forward to hearing from all of our witnesses here today. And I recognize the Ranking Member of the Task Force, Mr. Cohen from Tennessee, for his opening statement.

Mr. COHEN. Thank you, Mr. Chair.

During today’s hearing, we will hear a lot of heated claims about President Barack Obama’s supposed disrespect for the Constitution and the separation of powers. We will probably hear a little bit in response about the disrespect that President Obama has suffered ever since he’s been elected. We will hear that the Administration’s decisions regarding the implementation of certain provisions of the Affordable Care Act, the Patient Protection Act, and institute deferred action programs for certain undocumented immigrants, amounted to a usurpation of Congress’ legislative authority and a failure to meet the constitutional obligation to take care to faithfully execute the law.

We have been hearing these same arguments on both of these issues for quite a while. Indeed, they are of a piece with the long-

standing attempt to paint this President's actions, in particular, as somehow illegitimate.

This has been a problem with Presidents elected from Illinois for years. The previous President elected from Illinois, Abraham Lincoln, was immediately questioned by the Southern States, and they then decided to leave the country because of his election and the fact that he was against slavery, and they called him a Black Republican. Now, 150 years later, we got a Black Democrat President, and we've had the same visceral response to a President from Illinois.

It's regrettable. And I regret to inform the critics that neither the facts nor the laws support their positions that these hearings are based upon. In the case of both the Administration's executive actions implementing the Affordable Care Act and its deferred action programs, the Administration was simply exercising the broad enforcement authority that we in Congress delegated to the executive branch by statute, authority that Congress could always curtail if it chose to.

For instance, with respect to delaying implementing the ACA's employer mandate, section 7805(a) of the Internal Revenue Code grants the Treasury Department broad administrative authority to grant transitional relief to phase in major new tax provisions.

Such reasonable delays in implementation are routine, particularly when a complex new law like the ACA is being implemented. Indeed, the George W. Bush administration relied on such authority to postpone implementation of a provision of a Medicare-related law in 2003.

Similarly, Congress granted the executive branch broad enforcement authority with respect to immigration matters involving the authority to set enforcement priorities in light of limited resources. Specifically, the Immigration and Nationality Act gives the executive branch broad authority to issue regulations and instructions to carry out such other acts as deemed necessary for enforcing that statute.

Additionally, the Homeland Security Act directs the Secretary of Homeland Security to establish national immigration enforcement policies and priorities. The Administration's deferred action programs represent just such a prioritization of enforcement resources, concentrating those resources toward the removal of violent felons over the removal of law-abiding people.

History reinforces the fact that the broad exercise of enforcement discretion in the immigration context is longstanding and legal, and it's logical. You don't just willy-nilly act on people. You take the ones that are the most harmful potentially to the society and you prioritize.

Indeed, the Reagan and George H. W. Bush administrations pursued a deferred deportation policy for the spouses and children of certain unauthorized immigrants who could qualify for legalized status. This Reagan-Bush policy, moreover, arguably was similar in scale to the Obama administration's deferred action programs, and all three of those Presidents acted using their intellect and not a lottery system.

The fact is the Constitution has little to do with the debate we're having today. It's the President that we presently have and the

Mitch McConnell rule of saying doing all we can from day one to defeat him that has to do with this debate today.

The arguments arise from the fact that opponents of the Administration's actions simply have not had and do not have the votes to overturn these programs through the political process, so they attempt to turn political and policy disputes into constitutional crises. It won't work.

The Supreme Court has already upheld the Affordable Care Act against constitutional and other legal challenges, in *NFIB v. Sebelius* and *King v. Burwell*, and has rightly declined to consider a challenge based on the origination clause. And I believe it will similarly uphold the Administration's deferred action programs this term in *U.S. v. Texas*. We will see.

Political and policy disagreements over health care and immigration are one thing. The Administration, however, acted well within its authority and in doing so faithfully executed the law. And at least as far as the Constitution is concerned, that is where today's debate should end. And the President was not born in Kenya.

Thank you.

Mr. KING. The gentleman's time has expired.

And I now recognize the gentleman, the Chairman of the full Committee, Mr. Goodlatte, for his opening statement.

Mr. GOODLATTE. Thank you, Chairman King, for convening the second hearing of the Task Force on Executive Overreach. The topic today includes recent case studies of the abuse of executive power, and I'll focus my remarks on the President's recent actions regarding the implementation of his own ObamaCare law.

The witness invited by the minority to the Task Force last meeting based his testimony around the proposition that the most pernicious violations of the separation of powers involve a President's "inappropriate claim of indefeasible power where even the most unambiguous legislative mandates may go unenforced."

With that in mind, consider that in the ObamaCare statute Congress provided for clear statutory deadlines for compliance, including this one regarding the mandates the statute imposes on employers: "The amendments made by this section shall apply to months beginning after December 31, 2013." Few provisions in statutory law could be clearer than a decline citing a date on the calendar.

Yet the current Administration has unilaterally sought to rewrite the law, not by working with the people's duly elected representatives, but in the following ways. Through blog posts which stated the Administration's unilateral removal of penalties for employers who would otherwise be required to provide insurance coverage for their employees. Through regulatory fact sheets which create an entirely new category of businesses and exempts them from their responsibility under the law. And through letters which specifically cite the fact that people are having their health insurance terminated under ObamaCare in violation of the President's promise that if you like your healthcare plan, you can keep it, and then claimed to suspend the law's insurance requirements to a date uncertain.

One letter alone suspended the application of eight key provisions of ObamaCare, namely, those requiring fair health insurance

premiums, guaranteeing the availability of coverage, guaranteeing renewable coverage, prohibiting exclusions for preexisting conditions, prohibiting discrimination based on health status, and many others.

And why was this done? To delay the terrible consequences of ObamaCare until after the next election.

As this headline from the Hill newspaper announced, “New ObamaCare delay to help midterm Dems. Move will avoid cancellation wave before election day.” And as The Washington Post described the situation: “White House delayed enacting rules ahead of 2012 election to avoid controversy.”

The liberal Washington Post also weighed in on the subject, stating in a board editorial: “The administration is unilaterally making distinctions between large businesses and medium ones. The latter group, which will get hardest hit and scream loudest when the employer mandate kicks in, will be treated more leniently. The law is also explicit that the government should be enforcing penalties already; that’s the plainest interpretation of Congress’ intent. The administration shouldn’t dismiss that without exceptionally good reason. Fear of a midterm shellacking doesn’t qualify as good reason,” said the Washington Post editorial board.

University of Michigan Law Professor Nicholas Bagley, who generally supports ObamaCare, wrote in the New England Journal of Medicine that the Administration had encouraged “a large portion of the regulated population to violate a statute in the service of broader policy goals,” and had adopted a theory that would, “mark a major shift of constitutional power away from Congress, which makes the laws, and toward the President, who is supposed to enforce them.”

As one of our witnesses today will more fully explain, this Administration has even unconstitutionally used Federal funds that were not appropriated by Congress to subsidize insurance companies. The Administration requested such appropriations, which were denied by Congress, yet the Administration used the unappropriated funds anyway, willfully, unilaterally, and unconstitutionally.

I was one of the authors of the House resolution authorizing a lawsuit on behalf of the House itself against the Administration for the abuse of executive power in the implementation of ObamaCare. And last year, a Federal judge held the following: “Neither the President nor his officers can authorize appropriations. The assent of the House of Representatives is required before any public moneys are spent. Congress’ power of the purse is the ultimate check on the otherwise unbounded power of the executive. The genius of our Framers was to limit the executive’s power by a valid reservation of congressional control over funds in the Treasury.”

Disregard for that reservation works a grievous harm on the House, which is deprived of its rightful and necessary place under our Constitution. The House has standing to redress that injury in Federal court.

As that case proceeds, the House has an independent duty to pursue other responses to be executive overreach that are within its legislative powers. And to that end, I look forward to hearing from all of our witnesses today.

Thank you, Mr. Chairman. I yield back.

Mr. KING. I thank the gentleman.

And I now yield to the venerable gentleman from Michigan, the Ranking Member of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I want to welcome all of our witnesses and look forward to their testimony.

Today's Executive Overreach Task Force hearing examines whether President Obama has violated the Constitution with respect to his authority to enforce the Affordable Care Act and the immigration laws. These are both issues that the full Committee has repeatedly considered in the past, and it's clear to me that the President has not violated any constitutional limitations on the exercise of his executive authority as to either of these areas.

To begin with, the Deferred Action for Parents of Americans and expanded Deferred Action for Childhood Arrivals immigration programs are clearly lawful exercises of executive discretion.

Now, Presidents from both parties, including George H.W. Bush and Ronald Reagan, routinely have used similar deferred deportation policies to promote family unity in our immigration system. These programs are commonsense solutions to our broken immigration system that has divided families for decades and subjected many to harsh immigration enforcement policies.

The Deferred Action for Parents of Americans and expanded Deferred Action for Childhood Arrival programs are not only appropriate, but perfectly lawful. Prominent legal scholars, including liberal professors, such as Lawrence Tribe, and conservative professors, such as Eric Posner, concur that these programs represent a lawful exercise of the President's executive authority.

Moreover, Supreme Court Chief Justice Roberts and Justice Anthony Kennedy have previously held that the executive branch retains broad discretion in immigration proceedings, and this is a principal feature of the removal system. This discretion permits the executive branch, through the Department of Homeland Security, to set priorities, and, accordingly, the agency has chosen to focus its enforcement efforts on those with serious criminal convictions instead of focusing on hardworking immigrants who simply lack documentation.

Although oral argument before the Supreme Court in the *United States v. Texas* is scheduled for next month, I fully expect the Court, in keeping with prior precedent, will uphold the Administration's immigration programs.

And we must note that the principal reason why these programs are necessary is because this Congress has repeatedly failed to take any action to fix our Nation's broken immigration system. Rather than addressing this problem, the majority has chosen to focus only on legislative initiatives aimed at deporting DREAMers and the parents of United States citizen children, as well as denying basic protections to children fleeing violence and persecution.

I sincerely hope this Congress can move forward toward repairing our broken immigration system instead of blaming this President for taking lawful actions that were well within his executive authority.

Finally, with respect to the Affordable Care Act, the majority in the House has on more than 60, 6-0, occasions, voted to repeal this law, but to no avail. So their assertion that it is an unconstitutional exercise of the President's executive power should come as no surprise.

Specifically, the act's opponents claim that the Administration, by providing transitional relief to large employers that do not provide health insurance for their employees by authorizing subsidies, usurped Congress' responsibility under Article I of the Constitution and violated the Constitution's take care clause. Yet, as Simon Lazarus, the minority witness, has previously explained, the Administration's actions in implementing the Affordable Care Act's complex statutory scheme were well within his statutory authority and consonant with the President's obligation to faithfully execute the law.

Clearly, we should be able to have legitimate policy differences without making unfounded accusations. There is substantial precedent supporting the President's actions in health care and immigration.

And I look forward to hearing the witnesses' testimony, and I thank the Chair.

Mr. KING. I thank the gentleman for his statement.

Without objection, other Members' opening statements will be made a part of the record.

[The prepared statement of Ms. Jackson Lee follows:]

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HEARING: "EXECUTIVE OVERREACH IN DOMESTIC
AFFAIRS PART I - HEALTH CARE AND IMMIGRATION."

OPENING STATEMENT

2141 RAYBURN HOB
TUESDAY, MARCH 15, 2016
10:00 A.M.

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- Thank you, Mr. Chairman. Good morning and welcome to our witnesses.
- We are here today to review purported claims that President Barack Obama's Administration has engaged in executive overreach.
- In particular, the Majority asserts that the Administration's actions constituted a breach of Congress's authority and violated separation of powers principles as it pertains to the implementation of the Patient Protection and Affordable Care Act (ACA), and with respect to immigration, the Deferred Action for Parental Accountability (DAPA) program, and the expansion of the existing Deferred Action for Childhood Arrivals (DACA) program.

- It is unfortunate that we are here to dispute what has already been resolved, that in both the ACA and immigration cases, the Administration has exercised long-standing and recognized discretion to implement and enforce laws.
- In fact, the Supreme Court has already ruled on the constitutionality of the Affordable Care Act and the issues brought today are now established law.
- Instead of spending time on our President's provision of basic healthcare and immigration services for people in need, and attempting to roll back constitutionally protected human rights, this committee should be holding hearings to advance legislation that will reform our truly broken immigration system.
- And if we are to have any discussion on the merits and apparent concern of presidential authority and separation of powers principles, particularly as it relates to healthcare and immigration policy, it is important to understand the history and context in which this misplaced concern is raised.
- The Majority cites the first Section of Article I of the Constitution, which indisputably provides that "All legislative powers herein shall be vested in a Congress of the United States."
- The Majority fails to cite, however, Article II, Section 3 of the Constitution, which further provides that the President, the nation's Chief Executive, "shall take Care that the Laws be faithfully executed."
- When read and applied in context, the executive actions taken by President Obama must be found to be reasonable, responsible and within his separate and vested constitutional authority.
- According to the Majority, however, delays in the implementation of the ACA's employer mandates, as well as the provision of subsidies for those seeking health insurance on federal exchanges, serve as examples of Executive "overreach" in the implementation of the ACA.
- In context, we cannot ignore the fact that both the tax credits and the cost-sharing reduction payments are closely related and integral to the proper functioning and purpose of the ACA.

- Congress did not intend to leave funding for such a critical component of the ACA (while providing a permanent appropriation for the tax credits) to the “vicissitudes of the annual appropriations process” when in fact the smooth functioning of the ACA requires that the cost-sharing subsidies and the tax credits to work in tandem.
- As such, making cost-sharing reduction payments necessarily falls within the scope of Presidential authority to take care and faithful execute the implementation of the ACA.
- The President's decision to extend certain compliance dates to help phase-in the act is not a novel tactic.
- And even though not a single court has ever concluded that reasonable delay in implementing a complex law constitutes a violation of the Take Care Clause, the majority insists that there is a constitutional crisis.
- Additionally, the exercise of enforcement discretion is a traditional power of the Executive.
- For example, the decision to defer deportation of young adults who were brought to the United States as children, the DREAMers, is a classic exercise of such discretion.
- History reminds us that the President should not be restricted from taking steps to protect people's rights.
- Lest we forget President Lincoln's executive action issuing the Emancipation Proclamation during a time when Fugitive Slave Laws sought to protect the institution of slavery, or President Truman's executive order desegregating the armed services in contravention of then-existing military policies.
- Certainly, it is no surprise that the Supreme Court has consistently held that the exercise of such discretion is a function of the President's power under the Take Care Clause.
- In addition to establishing the President's obligation to execute the law, the Supreme Court has consistently interpreted the “Take Care” Clause as ensuring presidential control over those who execute and enforce the law and the authority to decide how best to enforce the laws. See, e.g., *Arizona v. United States*; *Bowsher v. Synar*; *Buckley v. Valeo*; *Printz v.*

United States; Free Enterprise Fund v. PCAOB.

- Executive authority to take action is “fairly wide,” and the federal government’s discretion is extremely “broad” as the Supreme Court held in *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012), an opinion written Justice Kennedy and joined by Chief Justice Roberts:

“...A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.” (emphasis added) (citations omitted).

- The Court’s decision in *Arizona v. United States*, also strongly suggests that the executive branch’s discretion in matters of deportation may be exercised on an individual basis, or it may be used to protect entire classes of individuals such as “[u]nauthorized workers trying to support their families” or immigrants who originate from countries torn apart by internal conflicts.
- Exercising thoughtful discretion in the enforcement of the nation’s immigration law saves scarce taxpayer funds, optimizes limited resources, and produces results that are more humane and consistent with America’s reputation as the most compassionate nation on earth.
- Law abiding but unauthorized immigrants doing honest work to support their families pose far less danger to society than human traffickers, drug smugglers, or those who have committed a serious crime.
- Thus, the President was correct in concluding that exercising his discretion regarding the implementation of DACA and DAPA policies enhances the safety of all members of the public, serves national security interests, and furthers the public interest in keeping families together.
- In exercising his broad discretion in the area of removal proceedings, President Obama has acted responsibly and reasonably in determining the circumstances in which it makes sense to pursue removal and when it does not.
- In exercising this broad discretion, President Obama not done anything that is novel or unprecedented.
- Below are just a few examples of executive action taken by American

presidents, both Republican and Democratic, on issues affecting immigrants over the past 35 years:

1. In 1987, President Ronald Reagan used executive action in 1987 to allow 200,000 Nicaraguans facing deportation to apply for relief from expulsion and work authorization.
 2. In 1980, President Jimmy Carter exercised parole authority to allow Cubans to enter the U.S., and about 123,000 "Mariel Cubans" were paroled into the U.S. by 1981.
 3. In 1990, President George H.W. Bush issued an executive order that granted Deferred Enforced Departure (DED) to certain nationals of the People's Republic of China who were in the United States.
 4. In 1992, the Bush administration granted DED to certain nationals of El Salvador.
 5. In 1997, President Bill Clinton issued an executive order granting DED to certain Haitians who had arrived in the United States before Dec. 31, 1995.
 6. In 2010, the Obama Administration began a policy of granting parole to the spouses, parents, and children of military members.
- Because of the President's leadership and visionary executive action, 594,000 undocumented immigrants in my home state of Texas are eligible for deferred action.
 - If these immigrants are able to remain united with their families and receive a temporary work permit, it would lead to a \$338 million increase in tax revenues, over five years.
 - Finally, let me note that the President's laudable executive actions are a welcome development but not a substitute for undertaking the comprehensive reform and modernization of the nation's immigration laws supported by the American people.
 - Only Congress can do that, and such action by this Committee should be the priority.
 - Thank you.

Mr. KING. Now I would like to introduce the witnesses.

Our first witness is Elizabeth Papez, a partner at the Washington, D.C., law firm of Winston & Strawn and a former deputy assistant attorney general. Our second witness is Josh Blackman, an associate professor of law at South Texas College of Law/Houston. Our third witness is Simon Lazarus, senior counsel at the Constitutional Accountability Center. And our fourth witness is Elizabeth Slattery, a legal fellow at the Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies.

We welcome you all here today and look forward to your testimony.

Each witness' written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired, and we hope you are summed up at that point.

Before I recognize the witnesses, it's a tradition of the Task Force that they be sworn in. So please stand to be sworn, witnesses.

Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth, so you help God?

You may be seated. Let the record reflect that the witnesses answered in the affirmative.

I now recognize our first witness, Ms. Papez.

Ms. Papez, you're recognized for 5 minutes. Please turn on your microphone.

**TESTIMONY OF ELIZABETH P. PAPEZ, PARTNER,
WINSTON & STRAWN LLP**

Ms. PAPEZ. Thank you, Mr. Chairman, Mr. Ranking Member, Members and staff. I appreciate the opportunity to be here today to discuss executive implementation of Federal legislation, notably the Affordable Care Act, or ACA.

Executive action is obviously necessary to administer complex statutes, but it presents special challenges where agencies have to implement unfunded programs over time. In such cases, agencies can be tempted to depart from statutory mandates in order to address changing political or economic circumstances.

The ACA is a prime example of such legislation, and its implementation has been the subject of significant legal and policy debates since its passage 6 years ago. My comments this morning concern the governance issues underlying these debates that this Task Force has resolved to study. These issues transcend particular programs and Administrations, and as Chairman Goodlatte observed just last month, "are not partisan issues but rather American issues that touch the very core of our system of government."

When one branch of government oversteps its bounds to address perceived failings by another branch, it upsets the system of checks and balances that protects our democratic system. These upsets have real consequences for the millions of people and trillions of

dollars affected by executive implementation of Federal law, and the issues they raise in the ACA context require special attention, because they could have important consequences for future governments and programs that have nothing to do with health care. The few examples I'll touch on this morning illustrate the point.

The ACA provisions on employer coverage, cost-sharing subsidies, and premium tax credits present economic and practical challenges that have prompted agencies to second-guess appropriations and legislative decisions that the Constitution commits to the Congress. The executive's employer coverage regulations revise express statutory deadlines and participation requirements, the Treasury's cost-sharing regulations use money appropriated for specific tax credits to pay for cost-sharing subsidies Congress expressly refused to fund. And IRS regulations say that premium tax credits expressly directed at insurance exchanges "established by a State" may be used for insurance on exchanges not "established by a State."

The executive branch has obviously defended these actions as lawful efforts to implement the act in the face of unforeseen circumstances and a divided Supreme Court has now upheld some of these efforts. But these developments do not resolve the problems this Task Force has identified, and its commitment to avoiding agency overreach in statutory implementations is an important step toward protecting our constitutional system of checks and balances not just in the healthcare and immigration context we're discussing here today, but also in future areas that will rely on today's programs as precedent.

In the interest of time, I'll refer the Task Force and the hearing to my written testimony on the specifics of some of these case studies or examples of executive implementation. I'd be happy to answer questions.

The one thing that is common to all three examples is that we see the executive branch taking steps to try to implement a statute in the face of circumstances that the statute itself did not envision and that are not impossible to address. One way of addressing them would be for the executive branch to come back to Congress for initiatives that, if they are indeed common sense and are indeed in the spirit or purpose of the law, should be addressed by the legislature.

The disagreement over having to do that, I think, illustrates that the Constitution is indeed at stake and that we are in the midst of a time where the two branches have to reconcile political differences because the courts cannot resolve them all. These principles go back to the Declaration of Independence, which recognized the danger of concentrating power in a single person or body, and our Constitution answered this concern with a division of government authority that is often described as the essential basis of a free system of government.

The scope and importance of ACA's healthcare initiative can tempt and has tempted government action beyond certain of these limits, particularly in the face of changing economic and political circumstances. But it is precisely when the stakes are high and stakeholders may believe that the end justifies the means that the Constitution and laws must serve as a check on government action.

These checks, again, cannot be enforced by Federal courts alone, and where the political branches cannot work together to enforce them Congress can and should exercise its legislative, spending, and oversight powers to avoid the issues that have arisen in ACA's implementation to date. New statutes or amendments can minimize the extent to which Federal programs are unfunded or depend on State actions beyond Federal control. Congress can expressly limit appropriations in ways that the Supreme Court and other courts have said they will uphold in the future. And Congress can use its oversight authority to monitor agency implementation of statutes and consider whether further legislative or appropriations action is necessary under particular mandates.

Thank you again for the opportunity to address these important issues.

[The prepared statement of Ms. Papez follows:]

STATEMENT OF ELIZABETH P. PAPEZ¹
FORMER DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
EXECUTIVE OVERREACH TASK FORCE

EXECUTIVE OVERREACH IN DOMESTIC AFFAIRS
PART I – HEALTH CARE AND IMMIGRATION

MARCH 15, 2016

Thank you Chairman King, Ranking Member Cohen, and Members of the Task Force. I appreciate the opportunity to appear here today to discuss executive implementation of federal legislation, notably the Affordable Care Act or ACA. Executive action is necessary to administer complex legislation. But it presents special challenges under statutes that require the executive to run unfunded programs over time. In such cases agencies can be tempted to depart from statutory mandates in order to address changing political or economic circumstances. The ACA is a prime example of such legislation, and its implementation has been the subject of significant legal and policy debate since its passage six years ago. My comments this morning concern the governance issues underlying these debates that this Task Force has resolved to study. These issues transcend particular programs and administrations, and as Chairman Goodlatte observed last month are “not partisan issues but American issues that touch[] the very

¹ Elizabeth P. Papez is a partner in the Washington, DC office of Winston & Strawn LLP who from 2007 to 2009 served as Deputy Assistant Attorney General in the Office of Legal Counsel at the United States Department of Justice. Ms. Papez is a graduate of Harvard Law School, earned her Bachelor of Science degree *summa cum laude* from Cornell University, and served as law clerk to Justice Clarence Thomas of the U.S. Supreme Court and Judge Danny J. Boggs of the U.S. Court of Appeals for the Sixth Circuit.

core of our system of government.”² When one branch of government oversteps its bounds to address perceived failings by another branch, it upsets the system of checks and balances that protects our democratic system. These upsets have real consequences for the millions of people and trillions of dollars affected by executive implementation of federal statutes. And the issues they raise in the ACA context require special attention because they could have important consequences for future governments and programs that have nothing to do with healthcare.

The few examples I’ll touch on this morning illustrate the point. The ACA provisions on employer coverage, cost-sharing subsidies, and premium tax credits present economic and practical challenges that have prompted agencies to second guess appropriations and legislative decisions the Constitution commits to Congress. The executive’s employer coverage regulations revise express statutory deadlines and participation requirements. The Treasury Department’s cost-sharing regulations use money appropriated for specific tax credits to pay for cost-sharing subsidies Congress expressly refused to fund. And IRS regulations say that premium tax credits expressly directed at insurance exchanges “established by a State” may be used for insurance on exchanges *not* “established by a State.”

The executive branch has defended these actions as lawful efforts to implement the Act in the face of unforeseen circumstances. And a divided Supreme Court has now upheld some of these efforts. But these developments do not resolve the problems this Task Force has identified, and its commitment to avoiding agency overreach in statutory implementation is an important step toward protecting our constitutional system of checks and balances not just in the health care and immigration areas this panel will discuss today, but also in future areas that will rely on today’s programs as precedent.

² Statement of R. Goodlatte, <https://judiciary.house.gov/press-release/house-judiciary-committee-passes-resolution-creating-task-force-on-executive-overreach/>

I. ACA Employer Coverage Regulations.

Section 1513 of ACA requires certain employers to offer certain insurance coverage by 2014 or face tax penalties.³ Notwithstanding this express directive, the Treasury Department announced that the Act's 2014 requirements would not apply until 2016,⁴ and granted so-called "transition relief" from statutory penalties for employers who cover at least 70 percent of relevant employees in 2015 and at least 95 percent of relevant employees in 2016.⁵

This kind of relief raises questions about when an agency crosses the constitutional line that separates implementation from legislation. Executive Branch agencies may interpret and enforce federal statutes, but may not rewrite or amend them. Since at least the 1700s a legislative act has been defined as a "standing Law" by which "every one may know what is his."⁶ Our Constitution reserves such acts to Congress, and agencies that make categorical changes to express statutory provisions push this constitutional boundary. Executive Branch prosecutorial discretion and authority to enforce laws does not allow it to exempt entire classes of people or conduct from express statutory requirements. That would be tantamount to suspending portions of a statute, which is a power our Constitution denies the executive.⁷

³ 43 U.S.C. §§ 4980H(a)-(b).

⁴ 79 Fed. Reg. 8544 (Feb. 12, 2014); <https://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20021014.pdf>.

⁵ <https://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20021014.pdf>

⁶ JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT, para. 136, in TWO TREATISES OF GOVERNMENT 358-59 (Peter Laslett ed., 1988) (1689).

⁷ "In the seventeenth century . . . royal suspensions and dispensations became a source of acute conflict between Parliament and the Crown." Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 691 (2014). As part of the constitutional settlement after the Glorious Revolution, "the monarch was henceforth denied suspending and dispensing powers" in "[t]he very first two articles of the English Bill of Rights of 1689," which state: "the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal," and "the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal." *Id.* (citing authorities).

II. Cost-Sharing Subsidies.

Section 1402 of ACA requires insurance companies to reduce co-payments, deductibles and other costs to qualified individuals who purchase health plans in public insurance exchanges. The section and Section 1412(c)(3) then authorize federal payments to insurance companies to offset the price of Section 1402's required cost-sharing. In its FY2014 budget submission the Executive Branch requested appropriations for these payments. When Congress did not authorize them, the Department of Health & Human Services responded that for purposes of "efficiency" it would fund the payments out of the "same account from which the premium tax credit portion of the advance payments are made."⁸ But the tax credits are funded through a permanent appropriation that does not reference the Act's cost-sharing provisions. The administration's expenditure of nearly \$3 billion in offset funds thus raises the question whether agency implementation of the Act's cost-sharing mandate violates Article I's prohibition on expending public funds without an "Appropriation made by Law."⁹

In February 2015 the chairmen of two House committees sent letters to the Treasury and Health and Human Services Departments asking for "a full explanation for, and all documents relating to" the administration's payment of cost-sharing subsidies.¹⁰ The agencies' response concedes that nearly \$3 billion in such payments were made in 2014, but refers questions about the legal basis for these payments to the administration's filings in a pending lawsuit.¹¹ That suit

⁸ Ltr. from S. Burwell to T. Cruz, M. Lee (May 21, 2014).

⁹ U.S. CONST. art. I, § 9, cl. 7. A July 2013 letter from the Congressional Research Service observes that "unlike the refundable tax credits, these [cost-sharing] payments to the health plans do not appear to be funded through a permanent appropriation. Instead, it appears from the President's FY2014 budget that funds for these payments are intended to be made available through annual appropriations."

¹⁰ Ltrs. from F. Upton, P. Ryan to S. Burwell, J. Lew (Feb. 3, 2015).

¹¹ Ltr. from R. DeValk, J. J. Esquea to P. Ryan (Feb. 25, 2015) (citing No. 1:14-cv-01967, *House of Representatives v. Burwell* (D.D.C. 2015).)

will not eliminate the need for continuing legislative oversight of the affected provisions, particularly those involving the employer mandate. In September 2015 the court ruled that the House did not have legal standing to challenge the executive’s delay of the employer mandate in federal court.¹² And if the court ultimately sides with the House on its remaining appropriations claims,¹³ the political branches will have to confront whether, and if so how, to fund the challenged subsidies without the invalid cross funding.

III. Premium Tax Credits.

In an effort to make health insurance affordable to people required to purchase it, Section 1401(a) of the Act provides tax credits for insurance purchased on “an Exchange established by the State under section 1311.” 26 U.S.C. § 36B(c)(2)(A)(i). The Executive Branch recently issued regulations applying these credits to coverage purchased on exchanges created by federal agencies.¹⁴ In 2015 certain individuals challenged the legality of these regulations in the U.S. Supreme Court. The challengers argued that providing credits for insurance purchased on federal exchanges rewrote the Act’s language authorizing such credits only for insurance purchased on exchanges “established by [a] State.” The Executive Branch responded that these changes were consistent with the statute and necessary to avoid so-called “death spirals” in State insurance markets. In June 2015, the Supreme Court voted 6-3 to uphold the executive’s

¹² See No. 1:14-cv-01967, *U.S. House of Representatives v. Burwell et al.*, at 1-2 (Sept. 9, 2015).

¹³ See 5 U.S.C. § 706(2). ACA requires that an “issuer” of a qualified health plan to an eligible insured individual “shall reduce the cost-sharing under the plan at the level and in the manner” specified. 42 U.S.C. § 18071(a)(2). The issuer then “shall notify the Secretary of such reductions and the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions.” 42 U.S.C. § 18071(c)(3)(A). But the only appropriation the administration has identified with respect to the Act’s cost-sharing provisions is a provision that is linked to tax credits that expressly *exclude* insurance subsidies.

¹⁴ Specifically, the IRS regulations define “Exchange” to include both federal- and state-established exchanges, 45 C.F.R. § 155.20, and extend eligibility for tax credits to taxpayers enrolled through an Exchange so defined, 26 C.F.R. § 1.36B-1; 26 C.F.R. § 1.36B-2.

extension of tax credits to individuals who purchase insurance on federal (rather than state) created exchanges.¹⁵ The majority opinion acknowledges courts' duty to adhere to statutory text,¹⁶ but finds the Act's reference to exchanges "established by a State" ambiguous in context and thus open to executive interpretation that warrants judicial deference.¹⁷

* * * * *

These and other disagreements over executive implementation of ACA's insurance and funding provisions illustrate the importance of the issues this Task Force has resolved to address. The Declaration of Independence recognized the danger of concentrating power in a single person or body, and the Constitution answered this concern with a division of government authority that is often described as "the essential basis of a free system of government."¹⁸ The scope and importance of ACA's healthcare initiative can tempt government action beyond constitutional limits, particularly in the face changing economic and political circumstances. But it is precisely when the stakes are high and stakeholders may believe the end justifies the means that our Constitution and laws serve as a check on the exercise of government power. These checks cannot be enforced by federal courts alone. And where the political branches cannot work together to enforce them, Congress can exercise its legislative, spending, and oversight powers to avoid the issues that have arisen in ACA's implementation. New statutes or amendments can minimize the extent to which federal programs are unfunded or depend on State actions beyond federal control. Congress can expressly limit appropriations in ways that *Burwell*

¹⁵ No. 14–114, *King v. Burwell*, 576 U. S. ____ (June 25, 2015).

¹⁶ See *id.* at 8–9 (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U. S. 242, 251 (2010)).

¹⁷ See *id.* at 5 (quoting 26 U. S. C. §§36B(b)–(c)); *id.* at 8–15 (citing, *inter alia*, *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–43 (1984); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159 (2000); *Utility Air Regulatory Group v. EPA*, 573 U. S. ____ (2014)).

¹⁸ M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 133 (2d ed. 1998).

and other recent decisions suggest courts will uphold. And Congress can use its oversight authority to monitor agency implementation of statutes and consider whether further legislative or appropriations action is necessary, particularly under statutory provisions that give the executive some discretion to depart from statutory mandates.¹⁹ Thank you again for the opportunity to address these important issues.

¹⁹ ACA requirements that may be waived under section 1332 include (i) Part I of subtitle D to ACA Title I (requirements related to the establishment of qualified health plans), (ii) Part II of subtitle D to ACA Title I (requirements related to consumer choices and insurance competition through exchanges), (iii) section 1402 of the ACA (requirements related to reduced cost sharing for individuals enrolling in qualified health plans), (iv) section 4980H of the Internal Revenue Code (requirements related to shared responsibility for employers regarding health insurance), and (v) section 5000A of the Internal Revenue Code (requirements related to tax penalties for the failure to maintain essential health insurance). ACA § 1322; 77 Fed. Reg. 11701. But Section 1332 waivers are not available until 2017, ACA § 1332(a)(1), and even then are available only if a State shows that its innovation plan will (i) provide benefits at least as comprehensive as those required in ACA exchanges, (ii) provide coverage and cost sharing protections against out-of-pocket spending to make coverage at least as affordable as those provided by the ACA, (iii) cover at least a comparable number of residents as would be covered under the ACA, and (iv) not increase the federal deficit. ACA § 1332(b)(1).

Mr. KING. Thank you, Ms. Papez.
I now recognize Mr. Blackman.

**TESTIMONY OF JOSH BLACKMAN, ASSOCIATE PROFESSOR OF
LAW, SOUTH TEXAS COLLEGE OF LAW, HOUSTON**

Mr. BLACKMAN. Thank you. Mr. Chairman, Mr. Ranking Member, and Members of the Committee. My name is Josh Blackman. I'm a constitutional law professor at the South Texas College of Law in Houston, Texas.

I am honored for the opportunity to testify today about executive overreach and the Constitution, an area I have studied very closely. I am the author of "Unraveled: Obamacare, Executive Power, and Religious Liberty" from Cambridge University Press. I have published several articles on the constitutionality of DAPA. As well, I have filed several Supreme Court briefs with Cato Institute on immigration and ObamaCare.

In my brief time, I wish to make three points concerning the President and how he has seized upon congressional gridlock to aggrandize the executive's power. Rather than focusing on whether these actions are constitutional, which Ms. Papez and Ms. Slattery have ably covered, I want to highlight the relationship between Congress and the President that gave rise to these actions.

First, after Congress rejected the President's immigration agenda, he took unilateral executive action to grant lawful presence to millions of aliens and accomplished the very sort of reforms that Congress rejected.

Second, even where bipartisan consensus emerged to minimize the harmful effects of the Affordable Care Act, the President has modified the law's mandates.

Finally, I will sound an alarm: executive lawmaking poses an encroaching threat to the separation of powers and rule of law and that Congress, and not just the Court across the street, must take steps to halt.

So let's start with ObamaCare. In what has become a troubling pattern of abuse, the executive branch has modified the law's mandates, the individual mandate and the employer mandate. What makes these alterations particularly harmful is that bipartisan support existed to amend the ACA to ameliorate these mandates. However, the President has rejected the legislative process through a series of memoranda, regulations, and even blog posts. Executive officials have remade the law in their own image.

The ACA's employer mandate was supposed to go into effect on January 1, 2014. On July 2, 2013, in a blog post titled, fittingly, "Continuing to Implement the ACA in a Careful and Thoughtful Manner," the Obama administration nonchalantly suspended the employer mandate till 2015. I have called this process regulation by blog post.

What makes this unilateral delay all the more remarkable is that 2 weeks after the blog post, this House passed the "Authority for Mandate Delay Act." The two-page bipartisan bill would have delayed the implementation of the mandate until 2015. This is precisely what the blog post accomplished, except it had the backing of the legislative branch. In response to this bill, which would have

given him the authority to take action, what did the President do? He issued a veto threat.

A similar pattern played out with respect to the ACA's individual mandate. In 2013, as millions of Americans received cancellation notices, a bipartisan consensus emerged that the mandate had to be delayed to help people who liked their plans to keep them. In October, Senator Landrieu introduced a bill that would grandfathered all active plans that were valid in 2013. On November 15, this House passed a similar bill on a bipartisan basis, 261-157. Once again, the President issued a veto threat to the House bill. He said that it would "sabotage the healthcare law." This body cannot sabotage a law. All this body can do is change the law.

On November 15, 1 hour before the House voted on this bill, the President announced what became known as the administrative fix. The fix allowed people to keep their plans. Ironically, the exact bill that he threatened to veto accomplished the same thing as his executive action. The President enacted through executive action what this Congress was willing and able to do in a rare instance of bipartisan agreement.

Let's move on to immigration. Much like with the ACA, for immigration the President has transformed congressional defeat into executive action. In June 2014, the House announced that they would not bring for a vote the Gang of Eight bill, the comprehensive immigration reform bill. Okay? Within hours of learning that the Senate bill was dead, the President announced he would act alone. He said, "I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing. I will fix as much of our immigration system as I can on my own, without Congress."

On November 20, after the elections, he revealed DAPA. Like the mythical Phoenix, DAPA arose from the ashes of congressional defeat, and DAPA, again, accomplished several of the key objectives of a bill that Congress voted down. The pattern has become all too clear. First, Congress passes a statute. Second, the statute is inconsistent with the President's evolving policy preferences. And third, the Administration modifies or suspends enforcement of the law to achieve results inconsistent with what Congress designed.

During the hearing today, I hope to discuss steps Congress and the President can take to remedy these serious threats to our separation of powers. Thank you. I welcome your questions. And beware of the Ides of March.

[The prepared statement of Mr. Blackman follows*]

***Note:** Supplemental material submitted by this witness is not printed in this hearing record but is on file with the Subcommittee and can be accessed at:

<http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104663>.

Written Statement
Josh Blackman
Associate Professor of Law
South Texas College of Law, Houston

Task Force on Executive Overreach
U.S. House of Representatives
March 15, 2016

“Gridlock and Executive Power”

Introduction

Chairman Goodlatte, Ranking Member Conyers, and members of the Task Force on Executive Overreach, my name is Josh Blackman, and I am a constitutional law professor at the South Texas College of Law in Houston. I am honored to have the opportunity to testify about executive overreach and the Constitution, an area I have studied very carefully. First, with respect to the Affordable Care Act, I am the author of *Unraveled: Obamacare, Executive Power, and Religious Liberty*, which will be published by Cambridge University Press.¹ I have also filed amicus briefs before the Supreme Court in *King v. Burwell* and *Little Sisters of the Poor v. Burwell* on behalf of the Cato Institute.² Second, I have published several articles on the constitutionality of DAPA,³ and have filed amicus briefs in *Texas v. United States*, also on behalf of Cato.⁴ I have included copies of each in my prepared testimony.

In my brief time, I will make three points concerning how the President has seized upon congressional gridlock to aggrandize the executive’s power. First, after Congress rejected the President’s immigration agenda, he took unilateral executive action to grant lawful presence to millions of aliens, failing to take care that the laws are faithfully executed. Second, even where bipartisan consensus emerged to minimize the harmful effects of the Affordable Care Act, the

¹ See also *Unprecedented: The Constitutional Challenge to Obamacare* (Public Affairs 2013).

² Brief for the Cato Institute and Independent Women’s Forum, Zubik and Little Sisters of the Poor et al. v. Burwell, On Writs of Certiorari to the U.S. Courts of Appeals for the Third, Fifth, Tenth and District of Columbia Circuits (Jan. 11, 2106); Brief for the Cato Institute as Amicus Curiae in Support of Petitioners, Little Sisters of the Poor v. Burwell, On Petition for a writ of certiorari to the U.S. Court of Appeals for the Tenth Circuit (Aug. 24, 2015); Brief for the Cato Institute and Prof. Josh Blackman as Amici Curiae Supporting the Petitioners in King v. Burwell, et al, before the United States Supreme Court (14-114) (12/29/14).

³ *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 Georgetown Law Journal Online 96 (2015); *The Constitutionality of DAPA Part II: Faithfully Executing The Law*, 19 Texas Review of Law & Politics 215 (2015); *Immigration Inside The Law*, 55 Washburn Law Journal 31 (2016).

⁴ Brief for the Cato Institute and Law Professors as Amici Curiae Supporting Plaintiffs in *Texas v. United States*, before the Southern District of Texas (1:14-cv-245) (1/7/15); Brief for the Cato Institute and Professor Jeremy Rabkin as Amici Curiae in Support of Plaintiffs-Appellee in *Texas v. United States* before the Fifth Circuit Court of Appeals (May 11, 2015).

President has unilaterally modified, delayed, and suspended Obamacare's mandates. Finally, I will sound an alarm—executive law-making poses an encroaching threat to the separation of powers and the rule of law, that Congress, not just the courts, must take steps to halt.

I. The President Has Unilaterally Modified, Delayed, and Suspended the Affordable Care Act's Mandates

In what has become a troubling pattern of abuse, the executive branch has modified, delayed, and suspended the Affordable Care Act's employer and individual mandates. What makes these alterations particularly egregious is that bipartisan support existed to amend the ACA to ameliorate the harmful effects of these mandates. However, the President rejected the legislative process. Through a series of memoranda, regulations, *and even blog posts*, executive officials have disregarded statutory text, ignored legislative history, and remade the law on their own terms.

The Affordable Care Act's employer mandates requires businesses with more than 50 employees to provide their workers with health insurance, or else pay a penalty. Congress scheduled the mandate to go into effect on January 1, 2014. Throughout 2012 and 2013, businesses lobbied the White House, warning that full-time employment would be cut if the mandate went into effect. He listened. On July 2, Mark Manzur, the assistant secretary for tax policy, took to social media to update the ACA's status. In a blog post titled *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, the Obama administration nonchalantly suspended the employer mandate till 2015.⁵ What makes this unilateral delay all the more remarkable is on July 17, two weeks after the Treasury Department shared its new posting, the House of Representatives passed the "Authority for Mandate Delay Act."⁶ The two-page bill would have delayed the implementation of the employer mandate until 2015.⁷

That is *precisely* what the blog post accomplished, except it had the backing of the legislative branch. It was enacted on a 264-161 vote, with 35 Democrats voting yea. In response to this bill, which would have unequivocally given him the authority to delay the mandate, the President issued a veto threat. The White House said it was "unnecessary."⁸ Seven months after the initial blog post, the Treasury Department postponed the full implementation of the employer mandate until 2016.⁹

A similar pattern played out with respect to the ACA's individual mandate, which requires most Americans to carry health insurance that provides "minimum essential coverage." Failure to do so after January 1, 2014, results in the payment of a penalty, or if you ask the Supreme Court, a "tax." In June 2010, the Obama administration forecasted that "50 to 75 percent of the 14 million consumers who buy their insurance individually" would have their

⁵ Treasury Notes (July 2, 2013), <http://goo.gl/WQKJ7C>.

⁶ <http://clerk.house.gov/cvst/2013/roll361.xml>

⁷ <https://www.congress.gov/bills/113/congress/house-bill/2667>

⁸ http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr2667r_20130716.pdf

⁹ Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544, 8574 (Feb. 12; 2014).

insurance policies cancelled.¹⁰ Yet, regulations were issued to make it even harder for some plans to maintain grandfather status.¹¹

In 2013, as millions of Americans received cancellation notices, a bipartisan consensus emerged that the individual mandate had to be delayed, and that people could keep the plans they liked. In July, the House of Representatives passed the *Fairness for American Families Act*, which would have delayed the individual mandate for a year.¹² President Obama threatened to veto it, claiming it would “would raise health insurance premiums and increase the number of uninsured Americans.” In October, Sen. Mary Landrieu (D-LA) introduced *The Keeping the Affordable Care Act Promise Act*.¹³ The bill—whose title was a direct rebuke to the President’s broken promise—would have grandfathered all active plans that were valid on December 31, 2013. On November 15, the House of Representatives passed the *Keep Your Health Plan Act of 2013* on a bipartisan vote, 261-157.¹⁴ The one-page bill—similar to Sen. Landrieu’s proposal—would have allowed any plan that was valid in 2013 to be grandfathered into 2014.¹⁵ Fearing that the House bill could pass the Senate, which already had backing for Sen. Landrieu’s bill, the President issued a veto threat to the House bill.¹⁶ Obama claimed that it would “allow[] insurers to continue to sell” inadequate plans, and would “sabotage the health care law.”¹⁷

On November 14—one hour before the House of Representatives voted on the *Keep Your Health Plan Act*—the President announced what would become known as the *administrative fix*.¹⁸ HHS would “extend” the ACA’s “grandfather clause” to “people whose plans have changed since the law took effect.” The decree permitted “insurers [to] extend current plans that would otherwise be canceled into 2014, and [allowed] Americans whose plans have been cancelled [to] choose to re-enroll in the same kind of plan.” Ironically, this executive action mirrored the *Keep Your Health Plan Act*—the same bill that Obama threatened to veto earlier that day because it would “sabotage” the ACA. Now, Obama was unilaterally implementing virtually the same reform, without the benefit of congressional support.

II. The President Has Disregarded Congress’s Rejection of His Immigration Bills and Unilaterally Enacted His Own Preferences Through Executive Action

Much like with the Affordable Care Act, for immigration the President has transformed congressional defeat into executive action. The DREAM Act would have provided a form of permanent residency for certain immigrants who entered the United States as minors. Though the

¹⁰ Obama Admin. Knew Millions Could Not Keep Their Health Insurance, NBC News (Oct. 28, 2013), <http://goo.gl/daZAJY>. Indeed,

¹¹ See 45 C.F.R. § 147.140(g) (2010).

¹² <https://www.govtrack.us/congress/bills/113/hr2668#>

¹³ <http://thomas.loc.gov/cgi-bin/query/z?c113:S.1642>

¹⁴ <https://www.govtrack.us/congress/votes/113-2013/h587>

¹⁵ H.R. 3350, 113th Cong. (2013).

¹⁶ Justin Sink, *White House Threatens Veto of Upton Bill*, The Hill (Nov. 14, 2013), <http://goo.gl/wbxTmb>.

¹⁷ Statement of Administration Policy (Nov. 14, 2013), <http://goo.gl/NA0dz7>.

¹⁸ Statement by the President on the Affordable Care Act (Nov. 14, 2013), <http://goo.gl/6c3utS>.

bill passed the House of Representatives, it was defeated in the Senate.¹⁹ Shortly, after the bill was defeated, the President took matters into his own hand. As part of his “We Can’t Wait” campaign,²⁰ the President announced the Deferred Action program.²¹ DACA (“Deferred Action for Childhood Arrivals”), as it came to be known, in effect, sought to accomplish several of the key the statutory objectives of the DREAM Act—a law Congress expressly declined to enact—without the benefit of a statute.

Two years later, this pattern would repeat itself. On June 30, 2014, Speaker John Boehner announced that the House would not bring to a vote the comprehensive immigration bill that had passed the Senate a year earlier.²² Within hours of learning that the bill was dead, the President announced that he would act alone. The President explained that “I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing. . . . [I will] fix as much of our immigration system as I can on my own, without Congress.”²³

That declaration commenced an eight-month process where the White House urged its legal team to use its “legal authorities to the fullest extent.”²⁴ By one account, the President reviewed “more than [60] iterations” of the proposed executive action, expressing his disappointment because they “did not go far enough.”²⁵ Finally, on November 20, 2014—two weeks after the mid-term elections—he revealed DAPA. Like the mythical phoenix, DAPA arose from the ashes of congressional defeat. Like with DACA before it, DAPA accomplished several of the key statutory objectives of the comprehensive immigration reform bill that was defeated. The President has not acted as a faithful executor of the the laws.

III. Executive Lawmaking Irreparably Weakens Separation of Powers and Rule of Law

Executive lawmaking—which has alas become commonplace—poses a severe threat to the separation-of-powers principles that undergird the Constitution and ultimately the rule of law itself. The pattern has unfortunately become all too clear: (1) Congress passes a statute, (2) the statute is inconsistent with the president’s evolving policy preferences, so (3) the administration

¹⁹ Press Release, The White House, Remarks by the President on Immigration (June 15, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> (“Now, both parties wrote this legislation. And a year and a half ago, Democrats passed the DREAM Act in the House, but Republicans walked away from it. It got 55 votes in the Senate, but Republicans blocked it.”).

²⁰ Frank James, *With DREAM Order, Obama Did What Presidents Do: Act Without Congress*, NPR (Jun. 15, 2012, 3:52 PM), <http://www.npr.org/blogs/itsallpolitics/2012/06/15/155106744/with-dream-order-obama-did-what-presidents-do-act-without-congress> (“And like the other actions the president has increasingly taken as part of his ‘We Can’t Wait’ initiative, the decision announced Friday was characterized by Obama’s political opponents as an abuse of power and violation of congressional prerogatives.”).

²¹ Preston & Cushman, *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, Jun. 16, 2012, p. A1.

²² Steven Dennis, *Immigration Bill Officially Dead: Boehner Tells Obama No Vote This Year, President Says*, ROLL CALL, June 30, 2014.

²³ Remarks on Immigration (June 30, 2014), Available at www.washingtonpost.com/politics/transcript-president-obamas-remarks-on-immigration/2014/06/30/b3546b4c-0085-11e4-b8ff-89afd3fad6bd_story.html.

²⁴ Michael D. Shear & Julia Preston, *Obama Pushed ‘Fullest Extent’ of His Powers on Immigration Plan*, N.Y. TIMES, Nov. 28, 2014, Available at www.nytimes.com/2014/11/29/us/white-house-tested-limits-of-powers-before-action-on-immigration.html.

²⁵ Carrie Budoff Brown, *How Obama Got Here*, POLITICO, Nov. 20, 2014, available at www.politico.com/story/2014/11/how-obama-got-here-113077.html.

modifies or suspends enforcement of the law to achieve a result inconsistent with what Congress designed.

President Obama has opined that “in a normal political environment,” Congress could have easily passed a “technical change” to the ACA that did not “go to the essence of the law.”²⁶ But, the president parried, “we are not in a normal atmosphere around here when it comes to ‘Obamacare.’ We did have the executive authority to do so, and we did so.”²⁷ But it is entirely beside the point that a gridlocked Congress refuses to enact the laws the executive desires. Gridlock does not license the president to transcend his Article II powers and subjugate congressional authority. The separation of powers remain just as strong whether the relationship between Congress and president is symbiotic or antagonistic.

In the words of James Madison, the only way to keep the separation of powers in place is for “ambition . . . to counteract ambition.”²⁸ Although the Courts play an essential role to serve as the “bulwarks of a limited Constitution,”²⁹ our Republic cannot leave the all-important task of safeguarding freedom to the judiciary. To eliminate the dangers of non-enforcement, the Congress must counteract the President’s ambition.³⁰ The failure to do so will continue the one-way ratchet towards executive supremacy, and a dilution of the powers of the Congress, and the sovereignty of the people. The rule of law, and the Constitution itself, are destined to fail if the separation of powers turn into mere “parchment barriers”³¹ that can be disregarded when any President deems the law “broken.”

Thank you, and I welcome your questions.

²⁶ Remarks by the President in a Press Conference (Aug. 9, 2013), <http://goo.gl/2sGYTa>.

²⁷ *Id.*

²⁸ Federalist No. 51 (J. Madison).

²⁹ Federalist No. 78 (A. Hamilton).

³⁰ Josh Blackman, “Obama’s overreach? Look in the mirror, Congress,” Los Angeles Times, November 22, 2014, <http://www.latimes.com/opinion/op-ed/la-oe-blackman-obama-immigration-20141123-story.html>.

³¹ Federalist No. 48 (J. Madison).

Mr. KING. Thank you, Mr. Blackman.
And I recognize now Mr. Lazarus for his testimony.

**TESTIMONY OF SIMON LAZARUS, SENIOR COUNSEL,
CONSTITUTIONAL ACCOUNTABILITY CENTER**

Mr. LAZARUS. Thank you, Mr. Chairman, Ranking Member Cohen——

Mr. KING. Mic.

Mr. LAZARUS. I just said thanks to everyone. And thanks to my friend Professor Blackman for warning about the Ides of March.

I am senior counsel of the Constitutional Accountability Center. CAC, as we are called, has filed amicus curiae briefs in the Supreme Court, in the lower Federal courts in two cases concerning the Affordable Care Act in which we have represented leading Democratic Members of the House and the Senate. And in Texas' challenge to the Administration's DAPA immigration initiative, CAC is representing a bipartisan group of former Members of the House and the Senate who served while provisions of the immigration laws that figure in that case were adopted.

Respectfully, but regrettably, I must observe, as borne out by the Supreme Court's rejection of last year's *King v. Burwell* challenge, these claims that we are hearing of wayward executive conduct import the Constitution and law into what are, in reality, political and policy debates. They twist or simply ignore the text and manifest purpose of pertinent statutes and of the Constitution's take care clause and they contradict the consistent practice of all modern Presidencies, Republican and Democratic, to responsibly implement complex laws like the ACA and the immigration statutes. Thus, exercising Presidential judgment in carrying laws into execution is what the Constitution requires and what the Framers expected of the President.

So I will take the two areas that we're considering today in the order in which they emerged as major issues, health first and immigration second. And I'm going to have to obviously be very generally, don't have a lot of time. Perhaps questions will bring out, give me an opportunity to go into greater detail.

The ACA-related claim which has garnered the most attention has been the theory that the ACA barred tax credits to help purchase insurance in the 34 States using Federally Facilitated Marketplace exchanges for their residents. As explained by the four conservative Justices who dissented from the Supreme Court's 2012 decision to uphold the ACA's individual mandate, the exchanges without the subsidies would not operate as Congress intended and they may not operate at all.

But last year, in June of 2015, the Supreme Court rejected ACA opponents' gutting interpretation. The Court agreed with the Administration that the opponents improperly ripped an isolated four-word phrase out of context. Writing for a six-Justice majority, Chief Justice Roberts held that, "A fairer reading of legislation demands a fair understanding of the legislative plan." It is implausible, he ruled, that Congress meant the act to operate in a way that would cause that plan to fail.

Now, this is a very significant decision, which my copanelists want to ignore, skip over.

And I do want to make a point, Ms. Papez, that this was not a decision deferring to the agency's interpretation. Chief Justice Roberts and the Court very expressly said this was such a significant decision that they would not defer under the Chevron doctrine. This was an interpretation of the act that is the Court's own interpretation and it is its approach to interpreting the act that will govern in other cases.

As my copanelist, Ms. Slattery, quite appropriately noted, it will apply to other cases, probably including the immigration case.

So I want to note four things about that. First, we ought to note the chasm between the rhetoric about the Administration's alleged lawlessness and what the relevant law actually was and is, as the Supreme Court decisively held. That chasm should engender a certain degree of skepticism when we hear other over-the-top cries that the Administration is trampling on the Constitution.

Second, I think we should note a point that Ms. Slattery made in an article she wrote the day the decision came down that the kind of conservatives who brought that lawsuit brought it not because they were worried that it was being improperly implemented, but precisely because they wanted to block its implementation. This was a result at the top of their political agenda, but not properly a matter for the courts, as the Supreme Court's bipartisan majority quite plainly recognized.

And actually I've heard similar sentiments coming from my copanelists here, that these are policy and political disputes, Congress ought to try to do something about them and work with the Administration, they don't belong in the courts. And that's what Chief Justice Roberts made clear in that case, and I have every confidence that the same approach will govern the Court's response to the effort to turn into a legal and constitutional case what is really a policy and political dispute about immigration policy.

And I'll stop there. Sorry that I ran over a little bit. And perhaps we can pay some more attention to these details when we get questions.

[The prepared statement of Mr. Lazarus follows:]

Written Statement of Simon Lazarus

**Hearing Before the House Judiciary Committee Executive Overreach Task Force
“Executive Overreach in Domestic Affairs Part 1 – Health Care and Immigration”**

March 15, 2014, 10 a.m.

My thanks to Chairman King, Ranking Member Cohen, all members of the Task Force, and other House members in attendance, for inviting me to testify in this inquiry.

I am Senior Counsel of the Constitutional Accountability Center, a public interest law firm, think tank, and action center, dedicated to realizing the progressive promise of our nation's Constitution and laws. With respect to the matters at issue in this hearing, CAC has filed *amicus curiae* briefs in the Supreme Court and the lower federal courts in *King v. Burwell*, on behalf of House and Senate leaders and committee chairs responsible for crafting the Affordable Care Act, and in *United States v. Texas*, on behalf of a bipartisan group of former House and Senate members who served while immigration law provisions at issue in that case were considered, and in *House of Representatives v. Burwell*, in the District Court for the District of Columbia, on behalf of Minority Leader Pelosi and other leading members of the Democratic minority. In *King*, the Supreme Court upheld, in June 2015, the Obama Administration's provision of Affordable Care Act tax credits and subsidies through federally facilitated as well as state-operated exchanges. In *U.S. v. Texas*, Texas and other states are currently challenging the legality of the Administration's November 2014 initiative titled Deferred Action for Parents of American Citizens and Lawful Permanent Residents, informally known as "DAPA." In *House v. Burwell*, the House majority challenges the funding of cost-sharing subsidies to lower-income purchasers of health insurance on ACA exchanges. I have written in various media on the subject-matter of this hearing, and have testified on those issues before this Committee, the Committee on Government Oversight and Reform, and the Committee on Rules. My written statement here draws in part on those previous efforts.

Opponents of the ACA and of DAPA have routinely condemned these and other administration initiatives as "executive overreach," in violation of the President's constitutional duty to "take care that the laws be faithfully executed."

Regrettably, I must observe, as I have on the other occasions noted above, that these claims of wayward Executive conduct import the Constitution and law into what are, in reality, political and policy debates. They twist or simply ignore the text, meaning, and manifest purpose of pertinent statutory provisions, as uniformly understood in Congress on both sides of the aisle as those laws were crafted and enacted. These charges mock the text and original meaning of the Take Care clause. They flout Supreme Court precedents, both long-established and very recent. And they

contradict the consistent practice of all modern presidencies, Republican and Democratic, to responsibly implement complex and consequential regulatory programs like the ACA and the immigration laws. These claims fault the Obama Administration for making reasonable adjustments in timing and for matching priorities with resources and technical, practical, humanitarian, and other relevant policy exigencies – including, in the immigration case, foreign policy – implementing enforcement priorities and techniques that have been directly and repeatedly endorsed by Congress.

Thus exercising presidential judgment in carrying laws into execution is what the Constitution requires. It is precisely what the framers expected, when they established a separate Executive Branch under the direction of a nationally elected President, and charged him to Take Care that the Laws be Faithfully Executed.¹ That is what the President and the members of his administration have done with the ACA implementation decisions at issue and with the DAPA immigration initiative – whatever one may think of their actions from a policy or political perspective.

Necessarily, the subject-matter of the hearing, as framed by its title, covers a lot of ground. In my statement, I will address what I believe are currently the most frequent and serious allegations of executive overreach on the health and immigration fronts.² I will of course welcome questions on either the issues I address or others, and will try to answer all as well as I can. I'll take the two areas in the order in which they respectively emerged as major issues – health first and immigration second.

The Legality of the Administration's Implementation of the ACA

1. The claim (rejected by the Supreme Court) that the Administration "illegally" provided ACA-prescribed premium assistance tax credits to eligible individuals through federally facilitated as well as state-operated exchange market-places.

Among the litany of unlawful implementation alleged by ACA opponents, the claim which has to date occupied by far the most political and public attention, not to say

¹ Akhil Reed Amar, *America's Constitution: A Biography* 195 (2006): The sweeping provisions of Article II, including the Take Care clause "envisioned the president as a generalist focused on the big picture. While Congress would enact statutes and courts would decide cases one at a time, the president would oversee the enforcement of *all* the laws at once – a sweeping mandate that invited him to ponder legal patterns in the largest sense and inevitably conferred some discretion on him in defining his enforcement philosophy and priorities."

² Both Texas' lawsuit challenging the Administration's immigration initiative and the House majority's suit challenging ACA cost-sharing subsidy payments are themselves subject to serious objections that their proponents lack standing to bring their respective claims to federal court. I believe there is a strong likelihood that the Supreme Court will reject the radical expansion of standing doctrine requisite for either case to prevail, and have explained why in previous writings, but I will confine my written statement here to the merits of the "overreach" issues in which the Task Force appears to be interested. See <http://balkin.blogspot.com/2015/07/the-next-wave-of-court-challenges-to.html> and <https://newrepublic.com/article/127504/next-supreme-court-obamas-immigration-policy>

court-time, has been the theory that the ACA permitted tax credits to help low and moderate income individuals purchase insurance, but only in states which had established and run their own exchange market-place, not in states that had opted to let the federal Department of Health & Human Services handle that responsibility for their residents. Since 34 states took the federal exchange option in 2015, and 87% of all exchange-insured individuals were eligible to receive tax credits in the previous year, this theory – if upheld in court – would indeed have, in the words of its proponents, driven “a stake through the heart of Obamacare.” More specifically, as explained by the four conservative justices – Scalia, Kennedy, Thomas, and Alito – who dissented from the Court’s 2012 decision to uphold the ACA’s “individual mandate,” “Without the subsidies . . . the exchanges would not operate as Congress intended and may not operate at all.”³ The argument for reading the statute in a manner that would thus cause it to fail was shaped most prominently by Case Western Reserve Law Professor Jonathan Adler and Cato Institute Health Policy Studies Director Michael Cannon, in a law review article published well after the ACA was enacted. It rested on a subsection of the law, that pegs the amount of the credit to which a particular individual is entitled each year to “monthly premiums” for policies which “cover the taxpayer and were enrolled in through an *exchange established by the state* under [a specified section of the statute].” (Emphasis added) ACA supporters countered that the Adler-Cannon theory ripped an isolated four-word phrase out of context, and that when that phrase was read in the context of the overall law, and numerous specific provisions, their perverse, gutting interpretation proved to be incorrect.

While the ACA tax credits litigation wound through the federal courts, opponents of the Act ceaselessly cited their claim as evidence of the Obama administration’s allegedly chronic disregard for the law and the Constitution – including before this Committee. In June of last year, however, the Supreme Court put that canard to rest. Writing for a six-justice majority, Chief Justice John Roberts rejected the challengers’ a-contextual, hyper-literalist approach to statutory interpretation: “A fair reading of legislation,” he said, “demands a fair understanding of the legislative plan.” The focus on how a law is actually designed to operate is evident throughout the Chief Justice’s *King v. Burwell* opinion – starting with its introductory sentence: “The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market.” The opinion goes on to detail how the particular “interlocking reform” under challenge in the case – tax credits and subsidies for eligible exchange purchasers – is integral to other essential components, namely, mandating insurers to cover all applicants regardless of their health status, and mandating individuals to buy insurance or pay a tax penalty. Because of this underlying “plan,” Roberts said, “It is implausible that Congress meant the Act to operate” with no tax credits available in states that opted to let the federal government operate their exchanges.

I don’t think I can explain the significance of that ruling better than my co-panelist Elizabeth Slattery did the day of the decision. It was, she wrote on a Heritage Foundation legal blog – and I give her great credit for injecting humor into what was

³ *Nat’l Fed’n of Indep. Bus. V. Sebelius*, 132 S.Ct. 2566, 2674

certainly a deeply disappointing occasion – “a terrible, horrible, no good, very bad day for conservatives who pinned their hopes of blocking Obamacare on the Supreme Court.”⁴

I provide this detail of Chief Justice Roberts’ *King v. Burwell* holding, and the approach to statutory interpretation on which that holding rested, and my co-panelist’s reaction, not to do a victory lap or rub it in, but for four serious reasons central to this hearing:

1st, it is important to spotlight the chasm between the rhetoric about the alleged illegality and even unconstitutionality of the Administration’s interpretation of the ACA tax credit provisions, on the one hand – and what the relevant law actually was and is, as the Supreme Court decisively held. That chasm should engender skepticism when we hear similarly over-the-top claims that, in other instances, the Obama administration is “trampling on the law and the Constitution.”

2nd, I can’t help but note Ms. Slattery’s candid acknowledgement that conservatives, at least the brand of conservatives she had in mind, brought the *King v. Burwell* lawsuit, not because they were riled up that the Obama administration was implementing the law on the basis of an erroneous interpretation, but in order to “block” its implementation. This was of course a result at the top of their political agenda, but an effort that belongs in the political arena, not the courts – as the Chief Justice quite plainly recognized.

3rd, If, as Ms. Slattery says, these conservatives “pinned their hopes” on the Court, it reflected an expectation, however unspoken, that the five conservative justices would vote in lock-step to rubberstamp that political agenda – no matter if it took bending the law to do it. (In an unguarded moment prior to the Supreme Court’s acceptance of the case for review, counsel for the *King* ACA opponents made that cynical expectation all but explicit.⁵) That too is something to bear in mind, in other instances when the same sorts of charges of rampant executive infidelity to the law and the Constitution are bandied about.

4th, and most important, it is critical to focus on Chief Justice Roberts’ rationale in *King* – that laws should be interpreted to faithfully implement Congress’ operational plan, as manifest in the text and structure of the overall statute, not to subvert it. Here is how he concluded his opinion:

In a democracy, the power to make the law rests with those chosen by the people. . . . [I]n every case we must respect the role of the Legislature,

⁴ *In King v. Burwell Decision, Supreme Court Justices Acted As Lawmakers, Not Judges*, Daily Signal, June 25, 2015, <http://dailysignal.com/2015/06/25/in-king-v-burwell-decision-supreme-court-justices-acted-as-lawmakers-not-judges/>

⁵ Counsel Michael Carvin told a reporter, “I don’t know that four justices, who are needed [to grant review of the case] here . . . are going to give much of a damn about what a bunch of Obama appointees on the D.C. Circuit think,” and added, with a smile, when asked if he believed, that on the merits, he could lose any of the five conservative Supreme Court justices, “Oh, I don’t think so.” <http://talkingpointsmemo.com/dc/michael-carvin-halbig-supreme-court>

and take care not to undo what it has done. . . . *Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.* Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt." (Emphasis added)

Chief Justice Roberts could not have made it more clear that this approach will apply, not just to one case, but certainly to other challenges aimed at rendering the ACA dysfunctional, and, presumably, to other legal challenges similarly aimed at "undoing" legislative designs, thereby producing what the Chief Justice called "the type of calamitous result that Congress plainly meant to avoid."

Again, my co-panelist Ms. Slattery has nailed this point: "The ruling in *King v. Burwell*," she wrote, "could have broader implications for those trying to curb the [purported] excesses of our imperial president." She included "immigration reform" in a short list of administration initiatives to which she believes those implications will apply. I agree entirely with Ms. Slattery about the implications of the Chief Justice's approach to interpreting laws. However, what she here, echoing many other administration critics, tosses off as "excesses of our imperial president" actually amount to, as the Supreme Court held, carrying out the legislative plan as intended by the Congress that enacted it. Which is to say, carrying out, to a T, the President's constitutional duty to "take care that the laws be faithfully executed."

It is difficult to avoid concluding that what some administration opponents condemn as lawless "excesses" are in fact any policies or actions that conflict with their own political agendas. And their beef is not so much with the administration, as with the Supreme Court, and, indeed, with laws and the Constitution as they are understood and executed by Court and the administration – and, as we shall see, by past Supreme Courts, administrations, and, indeed, Congresses dating back decades, controlled by both parties.

2. The claim that the Administration violated the ACA and the Constitution, by postponing and adjusting statutory effective dates for regulations and other actions implementing it.

Opponents of the Administration – and, of the ACA – first charged that President Obama broke the law and abused his constitutional authority, when, on July 2 of 2013, his administration announced a one-year postponement of the January 1, 2014 effective date for the ACA requirement that large employers provide their workers with health insurance or pay a tax.⁶ Critics labeled this a "blatantly illegal move" that "raises grave concerns about [President Obama's] understanding" that, unlike medieval British

⁶ White House Statement, "We're Listening to Businesses about the Health Care Law" (July 2, 2013), available at <<http://www.whitehouse.gov/blog/2013/07/02/we-re-listening-businesses-about-health-care-law>>.

monarchs, American presidents have, under Article II, Section 3 of our Constitution, a "duty, not a discretionary power" to "take Care that the Laws be faithfully executed."⁷

These portentous indictments ignored what the Administration actually decided and how it delimited the scope and purpose of its decision. The Treasury Department's announcement provided for "transition relief," to continue working with "employers, insurers, and other reporting entities" to revise and engage in "real-world testing" of the implementation of ACA reporting requirements, simplify forms used for this reporting, coordinate requisite public and private sector information technology arrangements, and engineer a "smoother transition to full implementation in 2015."⁸ The announcement described the postponed requirements as "ACA mandatory" – i.e., not discretionary or subject to indefinite waiver. On July 9, Assistant Treasury Secretary Mark Mazur added, in a letter to House Energy and Commerce Committee Chair Fred Upton, that the Department expected to publish proposed rules implementing the relevant provisions "this summer, after a dialogue with stakeholders."⁹

On September 5, 2013, the Treasury Department issued those proposed rules. They detailed proposed information reporting requirements for insurers and large employers, reflecting, the Department stated, "an ongoing dialogue with representatives of employers, insurers, and individual taxpayers." The Department's release indicated its intent, through comments on the proposed rules, to continue fine-tuning ways "to simplify the new information reporting process and bring about a smooth implementation of those new rules."¹⁰

On February 10, 2014, the Administration, having completed that "dialogue," issued its final set of rules. In these final rules, the Administration further refined its phase-in procedures, with further "provisions to assist smaller businesses." Observing that "approximately 96 percent of employers . . . have fewer than 50 workers and are exempt from the employer responsibility provisions," the Administration sought "to ensure a gradual phase-in and assist the employers to whom the policy does apply. . . ." Toward that end, the final rules provide, for 2015, that:

o The employer responsibility provision will generally apply to larger firms with 100 or more full-time employees starting in 2015 and employers with 50 or more full-time employees starting in 2016.

⁷ Michael W. McConnell, "Obama Suspends the Law," *The Wall Street Journal* (July 8, 2013), available at: <<http://online.wsj.com/article/SB10001424127887323823004578591503509555268.html>>.

⁸ Mark J. Mazur, United States Department of the Treasury, "Continuing to Implement the ACA in a Careful, Thoughtful Manner" (July 2, 2013), available at <<http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner.aspx>>.

⁹ Letter from Mark J. Mazur, United States Department of the Treasury to the Honorable Fred Upton, Chairman, Committee on Energy and Commerce, Washington, D.C., 9 July 2013, available at <<http://democrats.energycommerce.house.gov/sites/default/files/documents/Upton-Treasury-ACA-2013-7-9.pdf>>.

¹⁰ United States Department of the Treasury Press Release, "Treasury Issues Proposed Rules for Information Reporting by Employers and Insurers Under the Affordable Care Act" (September 5, 2013), available at <<http://www.treasury.gov/press-center/press-releases/Pages/jl2157.aspx>>.

o To avoid a payment for failing to offer health coverage, employers need to offer coverage to 70 percent of their full-time employees in 2015 and 95 percent in 2016 and beyond¹¹

It is this process of dialogue and the timing adjustments and sequence resulting from that dialogue, that the resolution, and the lawsuit it purports to authorize, target as violative of the ACA and the Constitution. But the Administration explains these actions as sensible adjustments to phase-in enforcement, not a refusal to enforce. And its actions validate that characterization.

It bears emphasis that this Administration's approach to phasing in the ACA employer mandate, and other provisions of the law, is neither unprecedented, nor a partisan practice. Indeed, shortly after the initial July 2 announcement, Michael O. Leavitt, who served as Health and Human Services Secretary under President George W. Bush, concurred that "The [Obama] Administration's decision to delay the employer mandate was wise."¹² Secretary Leavitt made this observation based on his own experience with the Bush Administration's initially bumpy but ultimately successful phase-in of the prescription drug benefit to Medicare, which was passed in 2003 and implemented in 2006.

Experience so far strongly bears out Secretary Leavitt's expectation that delaying the employer mandate reporting requirements to simplify and improve them would facilitate smooth implementation of those provisions, without undermining the rest of the ACA, or Congress' broad goals in enacting it. The vast majority of the nation's six million employers – 96% -- employ fewer than 50 workers, and were therefore not covered by the employer mandate. Of those 200,000 that were covered, at least 92% already offered health insurance; so, during the phase-in period during which covered employers were not be penalized for failing to insure their employees, a relatively small number of workers would have remained uninsured because of the delayed implementation of the employer mandate. And even those workers would have, during 2014, been eligible for policies marketed on ACA exchanges and also for premium assistance subsidies.¹³ To put the issue in realistic perspective, health law expert Professor Timothy Jost observed that 171 million Americans were covered by employer-sponsored group policies, compared to only 11-13 million in the market for individual policies, at which the ACA is principally targeted.¹⁴ In light of these circumstances, the Congressional Budget Office estimated that fewer than half a million persons were likely

¹¹ U.S. Treasury Department, Fact Sheet accompanying *Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act (ACA) for 2015*. <http://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20021014.pdf>

¹² Michael O. Leavitt, "To implement Obamacare, look to Bush's Medicare reform," *Washington Post* (July 12, 2013), available at <http://www.washingtonpost.com/opinions/to-implement-obamacare-the-right-way-look-to-bushs-medicare-reform/2013/07/12/c2031718-e988-11e2-8f22-de4bd2a2bd39_story.html>.

¹³ Ezekiel J. Emanuel, "Obama's Insurance Delay Won't Affect Many," *New York Times* (July 3, 2013), available at <http://opinionator.blogs.nytimes.com/2013/07/03/obamas-insurance-delay-wont-affect-many/?_r=0>.

¹⁴ Timothy Jost, Implementing Health Reform: The Employer Responsibility Rule, Part I, *Health Affairs*, February 11, 2014, <http://healthaffairs.org/blog/2014/02/11/implementing-health-reform-the-employer-responsibility-final-rule-part-1/>

to go without insurance during this phase-in period, as a result of the postponement of the employer mandate.¹⁵

Though “wise,” was the postponement “illegal?” On the contrary, Treasury’s Mazur wrote to Chair Upton, such temporary postponements of tax reporting and payment requirements are routine, citing numerous examples of such postponements by Republican and Democratic administrations when statutory deadlines proved unworkable.¹⁶ Particularly relevant to – indeed, indistinguishable from – the Obama administration’s experience implementing the ACA, are roll-outs of major new health and health insurance programs by past administrations. As Secretary Leavitt noted, when the Bush administration implemented the 2003 Medicare Modernization Act provisions establishing the Medicare prescription drug program, it waived enforcement of the unpopular late enrollment penalty for one year for some beneficiaries, delayed key elements of the law’s methodology for calculating the share of premiums paid by some beneficiaries to reduce premiums, and limited enforcement of the law’s medication therapy management requirement to ease the burden on insurers.¹⁷ A study of implementation of Medicare mandates in the late 1990s following the enactment of the massive 1997 Balanced Budget Act found that almost half of the rules on the 1998 Medicare regulatory agenda with statutory deadlines had not been implemented on time.¹⁸

There is no material difference between these decisions by the Clinton and Bush administrations to postpone regulations and other incidents of major new health insurance laws and the Obama administration’s approach to implementing the ACA: all were reasonably considered necessary temporary adjustments, and as such were certainly legal and constitutional; like these precedents, there is every reason to expect that the Obama administration’s prudent phasing-in of the employer mandate, in dialogue with affected businesses, providers, insurers, and beneficiaries, will result in a program that optimally meets the needs of those stake-holders, while newly expanding access to quality health care for millions of Americans.

Nor are such experiences limited to tax or health insurance administration. To take one particularly well-known example, the Environmental Protection Agency, under Republican and Democratic administrations, has often found it necessary to phase-in implementation of requirements beyond statutory deadlines, to avoid premature actions that were poorly grounded or conflicted with other mandates applicable to EPA or other agencies. In 2013, as one of many examples, EPA delayed promulgation of Secondary National Ambient Air Quality Standards for Oxides of Nitrogen and Sulfur, over the objection of some environmental groups, on the pragmatic ground that there is too much scientific uncertainty to enable the Agency to promulgate new standards with the

¹⁵ Congressional Budget Office, *Analysis of the Administration’s Announced Delay in Certain Requirements of the Affordable Care Act* (July 30, 2013), <http://www.cbo.gov/publication/44465>

¹⁶ Mazur letter, *supra* note 5.

¹⁷ Corlette S Hoadley J., *Are the wheels coming off the ACA wagon? History suggests not.* The Hill Congress Blog, July 17, 2013, <http://thehill.com/blogs/congress-blog/healthcare/311441-are-the-wheels-coming-off-the-aca-wagon-history-suggests-not>

¹⁸ Timothy Jost, *Governing Medicare*. 51 *Administrative Law Review* 39 (1999).

requisite scientific basis. The Clinton and George W. Bush administrations had similar experiences. As of April 2005, EPA had completed 404 of the 452 actions required to meet the objectives of Titles I, III, and IV of the Clean Air Act Amendments of 1990. Of the 338 requirements that had statutory deadlines prior to April 2005, EPA completed 256 late: many (162) 2 years or less after the required date, but others (94) more than 2 years after their deadlines.¹⁹ The Act required EPA to promulgate regulations addressing forty categories of air pollution sources by 1992. EPA's first hazardous air pollution rules came out years later. Synthetic chemical manufacturing almost two years late and amended through 1996 – almost four years after deadline. Petroleum refineries, final rules in 1994, allowed compliance long after deadline – up to 10 years while the law required within 3 years with possible one year extension.¹⁹

To be sure, some administrative “delays” have in fact constituted *de facto* decisions not to enforce or implement laws, indefinitely and for policy reasons. For example, during the administration of President George W. Bush, EPA was frequently criticized in such terms for shelving a broad spectrum of regulations and other initiatives. In at least one highly visible instance, involving the agency's mandate to determine whether greenhouse gases are pollutants requiring regulation under the Clean Air Act, the Supreme Court ordered EPA to institute formal proceedings to make such a determination. *Massachusetts v. EPA*, 549 U.S. 497 (2007). Even after this decision, the Bush administration dragged its feet complying with the Court's order, and was widely criticized for apparent “deregulation through nonenforcement.”²⁰ Such intentional refusals to enforce or implement laws – such, for example, as Governor Mitt Romney's pledge in the 2012 presidential campaign to halt implementation of the ACA as soon as he took the oath of office – do violate the laws in question, and are, by definition, failures to faithfully execute the laws as required by the Constitution.

Applicable judicial precedent places such timing adjustments well within the Executive Branch's lawful discretion. To be sure, the federal Administrative Procedure Act authorizes federal courts to compel agencies to initiate statutorily required actions that have been “unreasonably delayed.”²¹ But courts have found delays to be unreasonable only in rare cases where, unlike this one, inaction had lasted for several years, and the recalcitrant agency could offer neither a persuasive excuse nor a credible end to its dithering. In deciding whether a given agency delay is reasonable, current law admonishes courts to consider whether expedited action could adversely affect “higher or competing” agency priorities, and whether other interests could be “prejudiced by the delay.”²² Even in cases where an agency outright refuses to enforce a policy in specified types of cases – not the case here – the Supreme Court has

¹⁹ EPA has completed most of the actions required by the 1990 Amendments, but many were completed late. GAO-05-613: Published: May 27, 2005. <http://www.gao.gov/products/GAO-05-613>

²⁰ Daniel Deacon, *Deregulation Through Nonenforcement*, 85 N.Y.U.L.Rev. 795 (2010); Felicity Barringer, *White House Refused to Open E-mail on Pollutants*, N.Y. Times, June 25, Five Lessons from the Clean Air Act Implementation Pace University Environmental Law Review (September 1996) (online at: <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1365&context=peir>

²¹ The Administrative Procedure Act, 5 U.S.C. § 706.

²² *Telecommunications Research and Action Center, et al. v. FCC*, 750 F.2d 70, 80 (1984).

declined to intervene. As former Chief Justice William Rehnquist noted in a leading case,²³ courts must respect an agency's presumptively superior grasp of "the many variables involved in the proper ordering of its priorities." Chief Justice Rehnquist suggested that courts should defer to Executive Branch judgment unless an "agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities."²⁴ The Obama Administration has not and is not about to abdicate its responsibility to implement the statute on whose success the President's historical legacy will most centrally depend.

Nor are regulatory delays in implementing the employer mandate an affront to the Constitution. In the relevant constitutional text, note the term, "faithfully," and the even more striking phrase, "take care." The framers could have prescribed simply that the President "execute the laws." Why did they add "faithfully" and "take care?"²⁵ Defining the President's duty in this fashion necessarily incorporated – or reaffirmed the previously implicit incorporation – of the concept that the President's duty is to implement laws in good faith, and to exercise reasonable care in doing so. Scholars on both left and right concur that this broadly-worded phrasing indicates that the President is to exercise judgment, and handle his enforcement duties with fidelity to all laws, including, indeed, the Constitution.²⁶ Both Republican and Democratic Justice Departments have consistently opined that the clause authorizes a president even to decline enforcement of a statute altogether, if in good faith he determines it to be violative of the Constitution. To be sure, as one critic has noted, a president cannot "refuse to enforce a statute he opposes for policy reasons."²⁷ But, while surely correct, that contention is beside the point here.

The Administration did not postpone the employer mandate out of policy opposition to the ACA, nor to any specific provision of it. It is ludicrous to suggest otherwise, and at best misleading to characterize the action as a "refusal to enforce" at all. Rather, the President has authorized a minor temporary course correction regarding individual ACA provisions, necessary in his Administration's judgment to faithfully

²³ *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

²⁴ 470 U.S. at 833 n.4.

²⁵ Initial drafts of what became what is now known as the "Take Care" clause provided simply that the President was to "carry into execution the national laws." In July 1787, in the Committee of Detail, charged with drafting language for the full convention to consider, there was debate over the phrase "the power to carry into execution," and when the Committee returned, that phrase had been removed, the new "take care language" emerged in place of the former phrase. As Farrand notes, some of the phrases under debate included (Max Farrand, *The Records of the Federal Convention of 1787, Volume II* 171): (He shall take care to the best of his ability that the laws) (It shall be his duty to provide for the due & faithful exec – of the Laws) of the United States (be faithfully executed) {to the best of his ability}. Ultimately, the Committee on Style adopted the phrase "take care that the laws be faithfully executed" into constitutional text in September 1787.

²⁶ See Stephen G. Calabresi & Saikrishna B. Prakash, "The President's Power to Execute the Laws," 104 *Yale L. J.* 541 (1994); see also Lawrence Lessig & Cass R. Sunstein, "The President and the Administration," 94 *Colum. L. Rev.* 1 (1994).

²⁷ McConnell, "Obama Suspends the Law," *The Wall Street Journal* (July 8, 2013), available at: <<http://online.wsj.com/article/SB10001424127887323823004578591503509555268.html>>

execute the overall statute, other related laws, and the purposes of the ACA's framers. As a legal as well as a practical matter, that's well within his job description.

In effect, ACA opponents' constitutional argument to the contrary amounts to asserting that the Administrative Procedure Act itself ratifies unconstitutional behavior. As noted above, the APA recognizes that delayed implementation of rules, beyond statutory deadlines, can come within the Executive Branch's lawful discretion, as long as such delays are "reasonable." Opponents' claim is that the "take care" clause must be interpreted to condemn any deviation from a statutory deadline for implementing a regulation, no matter how reasonable. This implausible interpretation flouts, not only Congress' understanding as expressed through the text of the APA, but administrative and judicial precedent as well. And, one should add, common sense.

3. The claim that the Administration is unlawfully funding cost-sharing subsidies to help eligible individuals afford health care.

In terms that resemble their losing claim against the provision of tax credits on federal exchanges, ACA opponents currently allege that the Administration has been and continues to unlawfully fund cost-sharing subsidies prescribed by Section 1402 of the Act. These CSS subsidies complement the premium assistance tax credits, for lower-earning persons eligible for the tax credits (under ACA §1401), and assist those comparatively lower income individuals in purchasing health care itself from providers.²⁸ In November 2014, a lawsuit was filed in the District Court for the District of Columbia challenging the legality of the delay of the so-called employer mandate, noted in the previous section of this statement, and also challenging the Administration's funding of cost-sharing subsidies. In September 2015, the District Court hearing that case denied the Administration's motion to dismiss the suit; the Administration had argued both that the House lacked standing to bring its claim, and that the House's argument on the merits failed to state a valid legal claim. The parties have filed cross-motions for summary judgment, and are awaiting a decision by the District Court.

As noted above, my organization, the Constitutional Accountability Center, has filed an *amicus curiae* brief with the District Court in this case, on behalf of Minority Leader Pelosi and other leading members of the House Democratic Caucus.²⁹ These leaders of the minority party support the Administration, with respect both to their position that one house of Congress lacks standing to bring the case, and to their position on the merits that the Administration has authority to fund the CSS subsidies. Here, in a

²⁸ Premium assistance tax credits are available to persons purchasing insurance through ACA-sanctioned state-level exchanges who earn between 100% and 400% of the Federal Poverty Level (FPL). Cost-sharing subsidies are available to persons eligible for premium assistance tax credits and whose incomes are between 100% and 250% of the FPL. According to an HHS Report released Friday, March 11, 2016, 59 percent of enrollees on exchange market-places nationwide were receiving cost-sharing reductions. <https://aspe.hhs.gov/pdf-report/addendum-health-insurance-marketplaces-2016-open-enrollment-period-final-enrollment-report>.

²⁹ http://theconstitution.org/sites/default/files/briefs/House_v_Burwell_Brief_Final.pdf

nutshell, is why – why the Administration has correctly interpreted the laws governing its authority to fund the subsidies, and why acting on that interpretation certainly does not run afoul of the President's constitutional responsibilities.

The current House leadership now argues that there is no appropriation for the cost-sharing reductions, even though, as it concedes, 31 U.S.C. § 1324 provides a permanent appropriation for the premium tax credits. The basis for the House's position is that Section 1401 of the ACA, which prescribes the tax credits, specifically references, and amends, 31 U.S.C. § 1324, as a permanent source of funding, whereas there is no such reference in Section 1402, which addresses the CSS subsidies. But the House's interpretation is at odds with the ACA's plan for reforming and restructuring individual insurance markets, would render dysfunctional the mechanisms Congress adopted to effectuate that plan, and, most bizarre, would result in the Administration being obliged to withdraw *more* funds from precisely the same permanent appropriation source – 31 U.S.C. § 1324 – than is the case with the Administration's interpretation, i.e. using that fund directly to reimburse insurers for funding the subsidies. Likewise, the House leadership's current interpretation conflicts with post-enactment congressional action confirming the shared original understanding that the premium tax credits and cost-sharing reductions are commonly funded.

No one doubts that the premium tax credits and the cost-sharing reductions are integrally related, and that both are critical to what the Supreme Court characterized, in *King v. Burwell*, as the ACA's "series of interlocking reforms designed to expand coverage in the individual health insurance market." The ACA "bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge"; it "generally requires each person to maintain insurance coverage or make a payment to the [IRS]"; and it "gives tax credits to certain people to make insurance more affordable." These three reforms, the Court made clear, "are closely intertwined"; the first reform would not work without the second, and the second would not work without the third.³⁰

The CSS subsidies complement the premium tax credits that *King v. Burwell* held were indispensable to the ACA's legislative plan, and are no less critical to that legislative plan. Both the premium tax credits and the cost-sharing reductions work in tandem to ensure stable individual insurance markets open to all individuals, regardless of pre-existing conditions or health status generally, and accessible to moderate and lower-income individuals who, prior to the ACA, went uninsured.

The text and structure of the ACA make clear that the cost-sharing reductions and the premium tax credits are both integrally-connected to each other and to the "interlocking reforms" adopted by the law. Indeed, from an operational standpoint, the ACA makes the two complementary mechanisms components of a single "program," which the Act directs the Government to "establish," to *ensure unified advance payments of both components*. Pursuant to this program, the Secretary of the Treasury must "make[] advance payment" of both premium tax credits and cost-sharing

³⁰ 135 S. Ct. at 2485, 2487

reductions “in order to reduce the premiums payable by individuals eligible for such credit,” and to establish a program under which . . . advance determinations are made . . . with respect to the income eligibility of individuals . . . for the premium tax credit . . . and the cost-sharing reductions,” and “make[] advance payments of such credit or reductions to the issuers of the qualified health plans in order to reduce the premiums payable by individuals eligible for such credit.” In the same vein, the law defines the term “applicable State health subsidy program” as the program under this title for the enrollment of qualified health plans offered through an Exchange, including the premium tax credits under section 36B of Title 26 and cost-sharing reductions under section 1402.”³¹

As with the premium assistance tax credits unsuccessfully challenged in *King v. Burwell*, the House leadership’s narrow interpretation of CSS-funding authority would similarly generate, as the Justice Department noted in its most recent brief in the case, a “cascading series of nonsensical and undesirable results that” would follow “if the Act did not allow the government to comply with the statutory directive to reimburse . . . insurers for the cost-sharing reductions”). Two such bizarre results are especially worth noting. As detailed in an *amicus curiae* brief filed on behalf of fifteen economic and health policy scholars (including the Director of the Congressional Budget Office from 2009 through 2015), many individuals who purchase coverage on state individual insurance markets do not receive premium assistance tax credits. Any such individuals who have opted to purchase what the ACA prescribes as “silver” plans would see their premiums rise. Hence, they would be motivated either to buy cheaper and less protective plans, or, possibly, to purchase more protective “gold” plans, which, paradoxically, could become less expensive than silver plans, or such persons would drop coverage altogether. Obviously, such results would flout the “market improvement” design of the ACA.

Second, even more nonsensical, these scholars explain, “the amount of the premium tax credits offered to subsidized enrollees would increase *across the board*.”³² As a result, federal expenditures would increase – and from the same fund – the permanent appropriation provided by 31 U.S.C. §1324 – from which the House leadership’s interpretation purports to save taxpayer dollars.³³

Because these mandatory payments were so critical to the effective operation of the ACA, Congress did not leave the funds for their payment to the vicissitudes of the annual appropriations process. Instead, Congress provided for their payment out of a permanent appropriation via 31 U.S.C. § 1324. At the time Congress was debating and enacting the ACA, this understanding was shared on a bipartisan basis. During the debate, some members expressed concern that these permanently-appropriated subsidies would not be subject to the Hyde Amendment, which under certain

³¹ 42 U.S.C. § 18082

³² Brief *Amici Curiae* for Economic and Health Policy Scholars In Support of Defendants, filed December 8, 2015. <http://premiumtaxcredits.wikispaces.com/file/view/4552756-2--24176.pdf/569554697/4552756-2--24176.pdf>

³³ <http://www.urban.org/research/publication/implications-finding-plaintiffs-house-v-burwell>

circumstances limits the use of annually-appropriated funds to pay for abortions.³⁴ To address those concerns, Congress adopted a provision to apply such funding restrictions to the subsidies that were permanently appropriated in the law, and in doing so, it made explicit that premium tax credits *and* cost-sharing reductions were the subject of permanent appropriations.³⁵

Since the ACA's enactment, Congress has not used its ample legislative powers to reverse or even to defund the Administration's implementation of the CSS subsidy program – even though it has done just that with respect to other aspects of the Administration's ACA implementation, as members of this Task Force well know. On the contrary, post-enactment congressional action has *confirmed* that Section 1324 provides a permanent appropriation for the advance payments that the ACA mandates that the Secretary make to insurers for the cost-sharing subsidies. For fiscal year 2014, both houses passed an appropriations bill that conditioned the payment of cost-sharing reductions (and premium tax credits) on a certification by HHS that the Exchanges verify that applicants meet the eligibility requirements for such subsidies.³⁶ To comply with this provision, HHS subsequently certified to Congress that the Exchanges “verify that applicants for advance payments of the premium tax credit and cost-sharing reductions are eligible for such payments and reductions.” Because there was no yearly appropriation for the payments, it would have made no sense for Congress to enact such a law if, as plaintiff now argues, Congress believed that there was no permanent appropriation available to fund the payments.

Finally, where is the Constitution in all of this? The answer is nowhere. What we have here is a routine dispute about statutory interpretation between one house of Congress and the Executive Branch. The Administration believes that, interpreted in line with long-established, common-sense requisites for construing statutes like the ACA, as recently confirmed and very pointedly applied to that statute by the Supreme Court, the ACA and 31 U.S.C. §1324 provide the latter provision as a permanent appropriation for fund the Section 1402 cost-sharing subsidies. The House asserts that it does not.

I strongly believe the Administration's interpretation is correct. If the case ever reaches the Supreme Court, I expect that view to be vindicated. After all, literally every challenge to an agency's interpretation of a law amounts to an allegation that it is acting – and spending – in excess of its authority. No more, as noted above, than adjusting regulatory deadlines, in the interest of effective implementation, does acting on a well-

³⁴ See, e.g., 155 Cong. Rec. S12660 (Dec. 8, 2009) (Sen. Hatch) (“this bill is not subject to appropriations”).

³⁵ See 42 U.S.C. § 18023(b)(2)(A) (“If a qualified health plan provides coverage of [abortions for which public funding is prohibited], the issuer of the plan shall not use any amount attributable to any of the following for purposes of paying for such services: (i) The credit under section 36B of Title 26 . . . (ii) Any cost-sharing reduction under section 18071 of this title . . .”).

³⁶ Continuing Appropriations Act, 2014, Pub. L. No. 113-46, Div. B, § 1001(a) (2013).

based and reasonable interpretation of a law constitute failure to take care that it is faithfully executed.³⁷

The Legality of the Administration's DAPA Initiative

As noted above, perhaps even more than with its implementation of the ACA the Administration has drawn strident laments of "unilateral rewrite of the law," "nullification," and even "clear and present danger to the Constitution," with its November 2014 program, Deferred Action for Children of American Citizens and Legal Permanent Residents, otherwise known as DAPA.³⁸ For similar reasons, these attacks on DAPA amount to political disagreements gussied up as legal and constitutional arguments. They should and, in my view, will be rebuffed by the Supreme Court just as sternly as was the bogus attempt to gut the ACA in *King v. Burwell* last year.

It bears particular emphasis that what these critics vilify as unlawful and unconstitutional are, in fact, immigration enforcement policies, practices, and legislation adopted and repeatedly deployed on a bipartisan basis, reaching back a half century. That broad-based congruence of established law and practice with the current enforcement practices under attack is evident in *amicus curiae* briefs recently filed in the Supreme Court, in support of the legality of DAPA, on behalf of former senior immigration officials from the Ford, Carter, Reagan, George H. W. Bush, Clinton, and George W. Bush Administrations, and on behalf of a bipartisan group of former members of the House and Senate.³⁹ And, especially pertinent in this forum, is a 1999 letter, attached to this statement, from 28 House members, including then-Judiciary Chair Henry Hyde and Immigration Subcommittee Chair Lamar Smith, recommending that the Immigration and Naturalization Service (soon to be absorbed in the Department of Homeland Security) adopt "Guidelines for use of Prosecutorial Discretion in Removal Proceedings," to ensure "consistency" in individual enforcement decisions. As detailed below, that letter spurred the Clinton, Bush, and Obama administrations to a succession

³⁷ Because the cost-sharing subsidies dispute is transparently a statutory interpretation dispute, the House lacks standing to pursue its complaint under established Supreme Court precedent, for reasons spelled out in CAC's above-noted *amicus curiae* brief, http://theusconstitution.org/sites/default/files/briefs/House_v_Burwell_Brief_Final.pdf pages 9-11

³⁸ Prior to DAPA, DHS in 2012 instituted a prior initiative, Deferred Action for Childhood Arrivals, which was somewhat modified by the DAPA directives, and could potentially be affected by the final resolution of the case now pending before the Supreme Court. In this statement, I intend "DAPA" to encompass both initiatives.

³⁹ Brief of Former Commissioners of the United States Immigration and Naturalization Service as *Amici Curiae* in Support of Petitioners, pages 21-23, filed March 8, 2016: <http://www.scotusblog.com/wp-content/uploads/2016/03/15-674tsacFormerCommissioners.pdf>; Brief of Former Federal Immigration and Homeland Security Officials as *Amici Curiae* in Support of the United States, filed March 8, 2016, pages 5-11, <http://www.fightforfamilies.org/assets/USvTexas-AmicusBriefofFormerImmigrationOfficials.pdf>; Brief of Bipartisan Former members of Congress as *Amici Curiae* in Support of Petitioners, http://theusconstitution.org/sites/default/files/briefs/United_States_v_Texas_Amicus_Brief_Final.pdf

of increasingly transparent guides to the exercise of discretion, most recently, indeed, in DAPA.⁴⁰

The Supreme Court has very recently reaffirmed and elaborated the Executive Branch's immigration enforcement responsibilities in terms that spell out a solid foundation for the steps this Administration took when it announced DAPA. Indeed, the very same week in which it upheld the ACA's individual mandate, on June 25, 2012, in *Arizona v. United States*, in an opinion written by Justice Anthony Kennedy, joined by Chief Justice Roberts, the Court held that "[a] principal feature of the [immigration] removal system is the broad discretion exercised by immigration officials," and that "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." As the Court explained, the Executive Branch's immigration enforcement discretion requires it to consider many factors in deciding when removal is appropriate, including both "immediate human concerns" and "foreign policy."⁴¹

The Administration was well within these parameters outlined by the Court, when the Department of Homeland Security issued the two directives that comprise the DAPA initiative. Specifically, these directives established priorities for DHS officials' exercise of their discretion when enforcing federal immigration law. They clarified that the federal government's enforcement priorities "have been, and will continue to be national security, border security, and public safety."⁴² They further directed that in light of those priorities, and given limited enforcement resources, federal officials should exercise their discretion, on a case-by-case basis, to defer removal of certain parents of U.S. citizens or lawful permanent residents.⁴³ Under other longstanding federal law – but NOT the DAPA directives themselves – aliens subject to deferred action, like many other aliens who are temporarily allowed to remain in the country, become eligible for work authorization. Work authorization under these circumstances is prescribed by regulations adopted in 1981 by the Reagan administration, subsequently endorsed by Congress in the 1986 Immigration Reform and Control Act (IRCA).⁴⁴

Congress has repeatedly conferred authority on executive branch officials to exercise discretion in enforcing the nation's immigration laws. For example, in the

⁴⁰ See notes 54-55 below and accompanying text.

⁴¹ 132 S.Ct. 2492, 2499 (2012)

⁴² Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., for Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, et al. 2 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

⁴³ Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., for León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [hereinafter DAPA Memo.].

⁴⁴ Brief of Former Commissioners of the United States Immigration and Naturalization Service as *Amici Curiae* in Support of Petitioners, pages 21-23, filed march 8, 2016 <http://www.scotusblog.com/wp-content/uploads/2016/03/15-674tsacFormerCommissioners.pdf> Brief of the United States of America, et al., Petitioners v. State of Texas, et al., <https://www.justice.gov/opa/file/829896/download>

Immigration and Naturalization Act (INA), Congress authorized the Secretary of Homeland Security to “establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority” under the statute.⁴⁵ And in the Homeland Security Act of 2002, Congress directed the Secretary to establish “national immigration enforcement policies and priorities.”⁴⁶

This delegation of discretion is, in fact, essential in the immigration context because Congress has made a substantial number of noncitizens deportable, but has nowhere mandated that every single undocumented immigrant be removed. Most important, Congress has declined to appropriate the funds that would be necessary to effectuate such a mass removal. Contrary to frequent assertions that the Obama Administration has “abdicated” immigration enforcement, in fact the Administration has substantially increased removal rates, averaging 360,000 per year since 2008; resources for increasing that rate further have never been and are not available. So this Administration – as would any administration – must decide, out of the estimated 11 million undocumented persons resident in the United States, what categories should be included in the less than four percent to be targeted for removal, what categories should be included in the 96% who cannot be removed, in the near term at least, and how those 10.6 million persons should be treated in the meantime.

In effect, as a leading scholarly article has put it, Congress has made a “huge fraction of noncitizens deportable at the option of the Executive.”⁴⁷ In that vein, Congress has directed the executive branch to exercise broad discretion in determining who should be removed consistent with the nation’s “immigration enforcement policies and priorities.”⁴⁸ Hence, it is well recognized by reputable scholars across the ideological spectrum that, as Professor Jonathan Adler – the same Professor Adler who led the challenge to ACA tax credits that became *King v. Burwell* – wrote skeptically in *The Volokh Conspiracy* of Texas’ current challenge to DAPA: “Immigration law is an area in which – for good or ill – Congress has given the executive wide latitude.”⁴⁹ Likewise on *Volokh*, George Mason scholar Ilya Somin made precisely the same observation, likewise questioning Texas’ case against DAPA.⁵⁰

Unquestionably, the enforcement priorities established by the Administration in DAPA are lawful and consistent with guidance provided by Congress. Repeatedly, as,

⁴⁵ 8 U.S.C. § 1103(a)(3).

⁴⁶ 6 U.S.C. § 202(5).

⁴⁷ Adam B. Cox & Christina M. Rodriguez, *The President and Immigration Law*, 119 Yale L.J. 458, 463 (2009).

⁴⁸ 6 U.S.C. § 202(5).

⁴⁹ Jonathan H. Adler, *Not Everything the President Wants To Do Is Illegal*, Wash. Post (Aug. 8, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/08/not-everything-the->

⁵⁰ Ilya Somin, *Obama, Immigration, and the Rule of Law*, Wash. Post (Nov. 20, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/20/obama-immigration-and-the-rule-of-law/> (noting that in the immigration context, “Congress itself has delegated wide latitude to the president”).

for example, in the 2010 Department of Homeland Security Appropriations Act, Congress has directed Congress to prioritize “the identification and removal of aliens convicted of a crime by the severity of that crime.”⁵¹ In a similar vein, the House report accompanying the FY 2009 DHS appropriations bill instructed the Department not to “simply round[] up as many illegal immigrants as possible,” but to ensure “that the government’s huge investments in immigration enforcement are producing the maximum return in actually making our country safer.”⁵²

Moreover, the practice of deferring removal of certain individuals in order to facilitate the nation’s immigration enforcement priorities is a long-standing one and one that has been deployed by presidents of both parties. As the Supreme Court observed, in a 1999 decision written by the late Justice Antonin Scalia,⁵³ the executive branch has long “engag[ed] in a regular practice (which ha[s] come to be known as ‘deferred action’) of exercising [its] discretion for humanitarian reasons or simply for its own convenience.”

Indeed, at least 20 instances have been found, stretching back into the 1950s, in which administrations of both parties have exercised enforcement discretion to confer deferred action treatment, or its equivalent, on a wide variety of categories of undocumented persons eligible for deportation.⁵⁴ Recognizing that there is nothing novel, let alone illegally novel, about the Obama Administration’s application of deferred action in DAPA, opponents have asserted that DAPA is different because its scale makes it “far afield” from all these past examples. But on that score the opponents are also wrong. The Reagan and George H.W. Bush administrations created a program for “voluntary departure,” functionally equivalent to what is now termed “deferred action on removal,” that protected from deportation “the spouse and unmarried children under 18, living with [a] legalized alien,” and meeting certain additional specified criteria. The Bush administration expanded the Family Fairness program to cover what it estimated as up to 1.5 million people – approximately 40% of undocumented immigrants in the United States at that time. That 40% is essentially exactly the percent of the current undocumented population that is eligible for deferred action treatment under DAPA. (Evidently, considerably fewer than 1.5 million persons came forward to apply for protection under the Family Fairness policy – but that fact does not undermine that Reagan-Bush program’s clear status as a precedent in all material respects for DAPA;

⁵¹ Pub. L. 111-83, 123 Stat. 2142, 2149 (2009)

⁵² H.R. Rep. No. 111-157, at 8 (2009)

⁵³ *Reno v. American-Arab Anti-Discrimination Comm.* 525 U.S. 471, 483-84 (1999)

⁵⁴ *United States v. Texas et al.*, Brief for the Petitioners, filed March 1, 2016, pages 48-59, <http://www.scotusblog.com/wp-content/uploads/2016/03/15-674isUnitedStates.pdf> Brief of Former Federal Immigration and Homeland Security Officials as Amici Curiae in Support of the United States, filed March 8, 2016, pages 5-11, <http://www.fightforfamilies.org/assets/USvTexas-AmicusBriefoffFormerImmigrationOfficials.pdf>

all persons eligible for DAPA may also choose not to apply, especially given the risks they will necessarily face by doing so.)⁵⁵

Another tack DAPA opponents have taken, to evade the overwhelming weight of constitutional, statutory, and administrative precedent is to assert, or insinuate that DAPA is distinguishable, and defective, because the priorities it enforces and techniques it employs are codified in writing, instead of being left to the discretion of individual line DHS officials. For obvious reasons, this line of argument has no legal basis, and certainly lacks any basis in sound policy or common sense. But perhaps most telling is that, in laying out departmental priorities in this manner, transparent to DHS officials, to persons subject to the Department's jurisdiction, and, most importantly, to Congress, DHS has specifically followed directions from Congress, in particular from prominent members of the House Judiciary Committee. In 1999, 28 members of the House, from both parties, led by then-Judiciary Chair Henry Hyde and Immigration Subcommittee Chair Lamar Smith, sent to Attorney General Janet Reno and Immigration and Naturalization Service Commissioner Doris Meissner, a letter entitled "Guidelines for Use of Prosecutorial Discretion in Removal Proceedings." The letter expressed concern that increased funding, intended to be used to remove "increasing numbers of criminal aliens," had instead been used to deport "law-abiding" legal permanent residents and law-abiding family members of U.S. citizens. The letter went on to state its signatories' belief that "INS District Directors . . . require written guidelines, both to legitimate in their eyes the exercise of discretion and to ensure that their decisions to initiate or terminate removal proceedings are not made in an inconsistent manner."⁵⁶ Following this bipartisan request, INS Commissioner Meissner issued a policy statement summarizing agency priorities and specifying factors to be considered by INS personnel to effectuate those priorities in individual cases. After INS became absorbed in the new DHS, subsequent regimes continued to reiterate and refine that written guidance, leading eventually to Secretary Johnson's DAPA memoranda.⁵⁷

Finally, opponents assert that the directives were inconsistent with the immigration laws because they permit recipients of deferred action to apply for work authorization. But opponents face a major problem with this line of attack. The authority for deferred-action recipients to work derives not from the directives at issue in this litigation, but from pre-existing regulations, endorsed by legislation, that date back to the Reagan Administration.⁵⁸ As noted above, IRCA was enacted against the backdrop of

⁵⁵ Brief of Former Federal Immigration and Homeland Security Officials as Amici Curiae in Support of the United States, filed March 8, 2016, pages 6-9. <http://www.fightforfamilies.org/assets/USvTexas-AmicusBriefofFormerImmigrationOfficials.pdf>

⁵⁶ Letter from Rep. Henry J. Hyde et al. to Janet Reno, Att'y Gen., and Doris Meissner, Comm'r, Immigr. & Naturalization Serv. (Nov. 4, 1999), <http://www.ice.gov/doclib/foia/prosecutorial-discretion/991104congress-letter.pdf>. A copy of the letter is attached to this statement.

⁵⁷ Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. Rev. 58, 87-89 (2015)

⁵⁸ See 8 C.F.R. § 274a.12(c)(14).

regulations, promulgated in 1981 by the INS, that permitted deferred action recipients to apply for work authorization, and shortly after IRCA was enacted, the INS denied a request that it repeal its employment authorization regulation. Congress has never acted to limit the executive branch's authority to give work authorization to deferred action recipients, nor to limit the practice of deferred action more generally.

In sum, there is no end of sound and fury directed at the Obama Administration's decision to provide written, transparent guidance to consider, on a case-by-case basis application of unassailably public-safety promoting and lawful priorities through grants of deferred action treatment, for three years, to parents of U.S. citizens and legal permanent residents. But behind the hyper-inflated rhetoric, from a legal standpoint, there is simply no there there.

Conclusion

In sum, at least with respect to the health and immigration controversies reviewed here, when one peels back the litany of allegations of unlawfulness and, especially, unconstitutionality, they seem to add up to nothing more than a complaint – how brazen it is of the President to do his job!

ATTACHMENT

76 INTERPRETER RELEASES

1730

December 3, 1999

Appendix I

Congress of the United States
Washington, DC 20515

Embargoed for release Monday
 November 8, 1999

Contact: Allen Kay
 Rep. Lamar Smith
 202-225-4236 (O)
 202-225-2659 (cell)
 301-990-3749 (H)

November 4, 1999

The Honorable Janet Reno
 Attorney General
 Department of Justice
 10th St. & Constitution Ave. NW
 Washington, DC 20536

The Honorable Doris M. Meissner
 Commissioner
 Immigration and Naturalization Service
 425 Eye Street, NW
 Washington, DC 20536

Re: Guidelines for Use of Prosecutorial Discretion in Removal Proceedings

Dear Attorney General Reno and Commissioner Meissner:

Congress and the Administration have devoted substantial attention and resources to the difficult yet essential task of removing criminal aliens from the United States. Legislative reforms enacted in 1996, accompanied by increased funding, enabled the Immigration and Naturalization Service to remove increasing numbers of criminal aliens, greatly benefitting public safety in the United States.

However, cases of apparent extreme hardship have caused concern. Some cases may involve removal proceedings against legal permanent residents who came to the United States when they were very young, and many years ago committed a single crime at the lower end of the "aggravated felony" spectrum, but have been law-abiding ever since, obtained and held jobs and remained self-sufficient, and started families in the United States. Although they did not become United States citizens, immediate family members are citizens.

There has been widespread agreement that some deportations were unfair and resulted in unjustifiable hardship. If the facts substantiate the presentations that have been made to us, we must ask why the INS pursued removal in such cases when so many other more serious cases existed.

Appendix I, continued

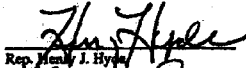
Attorney General Reno and Commissioner Meisner
November 4, 1999
Page 2

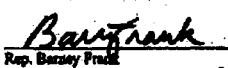
We write to you because many people believe that you have the discretion to alleviate some of the hardships, and we wish to solicit your views as to why you have been unwilling to exercise such authority in some of the cases that have occurred. In addition, we ask whether your view is that the 1996 amendments somehow eliminated that discretion. The principle of prosecutorial discretion is well established. Indeed, INS General and Regional Counsel have taken the position, apparently well-grounded in case law, that INS has prosecutorial discretion in the initiation or termination of removal proceedings (see attached memorandum). Furthermore, a number of press reports indicate that the INS has already employed this discretion in some cases.

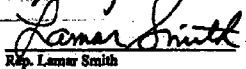
True hardship cases call for the exercise of such discretion, and over the past year many Members of Congress have urged the INS to develop guidelines for the use of its prosecutorial discretion. Optimally, removal proceedings should be initiated or terminated only upon specific instructions from authorized INS officials, issued in accordance with agency guidelines. However, the INS apparently has not yet promulgated such guidelines.

The undersigned Members of Congress believe that just as the Justice Department's United States Attorneys rely on detailed guidelines governing the exercise of their prosecutorial discretion, INS District Directors also require written guidelines, both to legitimate in their eyes the exercise of discretion and to ensure that their decisions to initiate or terminate removal proceedings are not made in an inconsistent manner. We look forward to working with you to resolve this matter and hope that you will develop and implement guidelines for INS prosecutorial discretion in an expeditious and fair manner.

Sincerely,

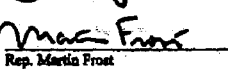

Rep. Henry J. Hyde


Rep. Barney Frank


Rep. Lamar Smith


Rep. Sheila Jackson Lee


Rep. Bill McCollum

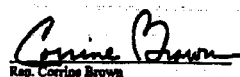

Rep. Martin Frost


Rep. Bill Barrett

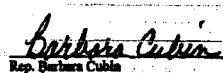

Rep. Howard L. Berman

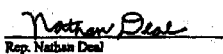
Appendix I, continued


Rep. Brian P. Bilbray


Rep. Corrine Brown



Rep. Charles T. Canady

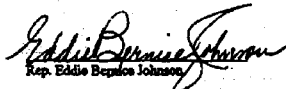

Rep. Barbara Cubin


Rep. Nathan Deal


Rep. Lincoln Diaz-Balart

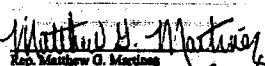

Rep. David Dreier


Rep. Bob Filner


Rep. Eddie Bernice Johnson


Rep. Sam Johnson


Rep. Patrick J. Kennedy


Rep. Matthew G. Martinez


Rep. James F. McGovern


Rep. Martin T. Meehan

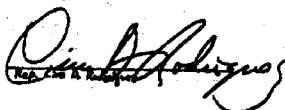

Rep. F. James Sensenbrenner, Jr.


Rep. Christopher Stays


Rep. Henry A. Waxman


Rep. Kay Hanger


Rep. Gabe Green


Rep. Luis G. Rodriguez

Mr. KING. Thank you, Mr. Lazarus.
And I now recognize Ms. Slattery for her testimony.

**TESTIMONY OF ELIZABETH H. SLATTERY, LEGAL FELLOW,
EDWIN MEESE III CENTER FOR LEGAL AND JUDICIAL STUD-
IES, THE HERITAGE FOUNDATION**

Ms. SLATTERY. I'd like to thank Chairman King, Ranking Member Cohen, and the other Members of the Task Force for the opportunity to discuss the Obama administration's unilateral actions. I would like to make three points this morning.

First, the President's constitutional duty to take care that the laws be faithfully executed is just that, a duty, and not an independent source of power. This duty includes complying with statutory mandates, enforcing laws and regulations, which includes prosecuting lawbreakers, and defending the validity of laws in court.

The take care clause does not allow the President to effectively amend or repeal existing laws through non-enforcement or creative interpretations. The Constitution does not vest lawmaking authority in the President.

For example, President Harry Truman seized the Nation's steel mills to prevent strikes during the Korean war, and this was right after Congress considered and rejected giving the President this very authority by statute. The Supreme Court ruled this seizure was unconstitutional. Likewise, the Court has said that allowing the President to ignore statutory mandates would clothe him "with a power to control the legislation of Congress."

Second, there is no question that the President and executive branch officials appointed by him have considerable discretion in how they execute the law, but that is not a blank check to effectively change the law through under-enforcement. Prosecutorial discretion is a necessary part of the President's duty to enforce the law, given the large body of laws and regulations on the books today.

Simply put, it would be impossible for the executive branch to prosecute every single lawbreaker of every law. For example, the government has only passively enforced the draft, and when a draft-dodging young man challenged his conviction on selective prosecution grounds, the Supreme Court ruled in favor of the government, because it "retains broad discretion as to whom to prosecute."

However, this does not mean the President can effectively nullify or change a law by under-enforcement. And that is where the Obama administration's deferred action policies for illegal immigrants differ from the draft situation. In the case of DACA and DAPA, Congress considered but never passed bills that would make similar changes.

An additional problem with these programs is that on top of not enforcing the law, the Administration would confer benefits through these programs, and this is clearly beyond the scope of prosecutorial discretion. As the Supreme Court has explained, the President's duty to execute the law "gives a governmental authority that reaches so far as there is law."

That is the situation we are dealing with today. President Obama is asserting an authority that reaches beyond where there is law.

My third and final point is that Congress, rather than the courts, is the branch of government best suited to solve this problem. It's inevitable that each branch of government will seek to expand its authority. That is why checks and balances were built into the constitutional design, making ambition counteract ambition, as James Madison explained in the Federalist Papers.

Members of Congress have the tools to resist the President's intrusion into the legislative sphere through appropriations, oversight hearings, and even impeachment proceedings. Senators have the additional tool of providing advice and consent on judicial and executive branch nominations.

Even when the action taken by Congress is not directly related to the President's overreach, it can be very effective. For example, Senator Robert Byrd once held up 5,000 military promotions because President Reagan made recess appointments without consulting the Senate first.

All Members of Congress, regardless of their party, should work to safeguard their prerogatives. It may be tempting for the next Republican President to copy President Obama's example and refuse to enforce laws that Republicans may not like. But for the sake of our liberties, Congress should encourage the current and future Presidents to comply with the limits placed on executive power. Otherwise, we will become a government of men rather than one of laws, as intended by our Founding Fathers.

Thank you, and I look forward to your questions.

[The prepared statement of Ms. Slattery follows:]

Congressional Testimony

Executive Overreach in Domestic Affairs Part I – Health Care and
Immigration

Hearing before the House Committee on the Judiciary Task Force on
Executive Overreach

U.S. House of Representatives

March 15, 2016

Elizabeth H. Slattery
Legal Fellow

Mr. Chairman, Mr. Ranking Member, Members of the Committee: My name is Elizabeth Slattery, and I am a Legal Fellow in the Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies. In this capacity, I research and write about the separation of powers, the rule of law, and the proper scope of the branches of government. The views I express in this testimony are my own and should not be construed as representing any official position of the Heritage Foundation.

I would like to thank the Task Force on Executive Overreach for the opportunity to discuss the imbalance of power between the Executive Branch and Congress. The matter of how Congress has lost power to the Executive Branch, either through ceding it to administrative agencies or through power grabs by the president, and whether this can be remedied present important issues regarding our system of government. Just as Congress has not always safeguarded its own authority, the president has overstepped the bounds of his constitutional powers. Unfortunately, President Barack Obama has acted unilaterally to effectively change the law, damaging the separation of powers in the process. These are challenges that will not disappear when the next president takes office, so Members of Congress should consider ways to rein in the current president and continue to do so with the next administration.

In this statement, I will address how the president's duty to faithfully execute the law and prosecutorial discretion fit within the separation of powers envisioned by the Framers of the Constitution. Next, I will discuss how the Supreme Court has treated conflicts involving presidents who have exceeded their authority. Then, I will argue that the rise of administrative agencies has exacerbated the imbalance of power between the branches of government. Finally, I will highlight instances when President Obama has exceeded his authority.

Separation of Powers, the Take Care Clause, and Prosecutorial Discretion

The rule of law is a bedrock principle of Anglo-American jurisprudence. It stands for the belief that all—including government officials—are subject to the law and not above it. America's Founding Fathers understood this principle, and the Constitution reflects it in at least three ways. First, instead of placing the legislative, executive, and judicial powers in one body, the Constitution divides federal power among three distinct but coordinate branches. Second, Article VI proclaims that the Constitution and laws passed following the Constitution are the "supreme law of the land." Third, Article VI also requires all federal officeholders to take an oath or affirmation to "support" the Constitution. Together, these provisions were intended to ensure that ours remains "a government of laws, and not of men."¹ The Framers of our Constitution also understood that, while a strong federal government was necessary, if left unchecked, it could encroach on the liberties of its citizens. To help prevent this, the Framers realized that, as James Madison wrote in *Federalist* 51, "[a]mbition must be made to counteract ambition....[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights."²

Accordingly, they devised a system of checks and balances through the Constitution that divided the powers of the federal government among the three branches. Article I of the Constitution grants enumerated legislative powers to Congress. The Constitution assigns the Executive the duty to enforce the law, and Article II, Section 3 requires that the president "shall take Care that the Laws be faithfully executed." The president also takes an oath to "preserve,

protect and defend the Constitution.” Article III vests in the courts the judicial power to resolve “Cases” or “Controversies” between adverse parties.

The scope of executive power has been debated since our nation’s founding. Certainly, it is not within the president’s power to create the laws; that is Congress’s job. As Supreme Court Justice Joseph Story noted in his *Commentaries on the Constitution*, the president may “point out the evil, and ... suggest the remedy,” but he lacks the power to enact or amend laws on his own.³ The president may “even call Congress into session, but it remains the prerogative of Congress to decide what laws will be enacted.”⁴ The Take Care Clause of the Constitution charges the president with a duty that includes complying with statutory mandates, enforcing laws and regulations (including prosecuting lawbreakers), and defending the validity of laws in court. This duty does not mean that he may act in such a way as to implement “laws” that have not been passed by Congress, to amend or effectively repeal existing laws, or suspend the law.

Further, all three branches of the federal government have an independent authority and duty to assess the constitutionality of laws to ensure that their actions are in accordance with the constitutional design. This means that the president may refuse to enforce a law if he has a good-faith belief that it is unconstitutional, since the Constitution is itself the highest law that must be “faithfully executed.”⁵ It does not allow the president to refuse to carry out a law that he disagrees with for policy or political reasons. To allow otherwise would “[clothe] the president with a power to control the legislation of congress, and paralyze the administration of justice.”⁶ Thus, the president “may not decline to follow a statutory mandate or prohibition simply because of policy objections.”⁷ Likewise, the president cannot effectively amend a law by exempting entire categories of lawbreakers from the application of that law.⁸ In order to change the law, the president must encourage Members of Congress to do so. As the Supreme Court has stated, “[o]nce a bill becomes law, it can only be repealed or amended through another, independent legislative enactment....”⁹

There is no question, however, that the president and senior Executive Branch officials who are appointed by the president have considerable discretion about what actions they take or do not take. The role of the president cannot be reduced to a catalog of “ministerial” acts.¹⁰ Moreover, courts generally are reluctant to delineate when the president has abused his discretion or abdicated a constitutional duty. As a practical if not legal matter, the president enjoys wide discretion in how to execute the law, particularly when forced to make choices due to resource constraints. To be sure, some judgment is warranted, given the large body of regulations churned out annually by administrative agencies and the ever-growing federal code the president enforces. Furthermore, it would be impractical for the Executive Branch to prosecute every violation of every law or regulation, so administrations must prioritize law enforcement resources and may decide not to enforce a particular law against a particular individual or small category of individuals on a case-by-case basis. This is known as prosecutorial discretion. For example, the government has only passively enforced the draft, and when a draft-dodging young man challenged his conviction on selective prosecution grounds, the Supreme Court ruled in favor of the government because it “retains ‘broad discretion’ as to whom to prosecute.”¹¹ Without limits, prosecutorial discretion becomes the exception that subsumes the rule, allowing the president to dispense with or suspend the law. The Constitution does not grant the president such powers. Charging the president with the faithful execution of

the laws emphasized that the Constitution does not confer a dispensing power on the executive. The Framers were familiar with this practice by British kings, and they deliberately chose to deny such a power to the president.

Past Conflicts Implicating the Scope of Executive Power

Courts generally are reluctant to get involved in disputes between the political branches that could be resolved without judicial interference. Under Article III of the Constitution, the judicial power extends to resolving “Cases” or “Controversies,” which not only ensures that courts adjudicate actual disputes between adverse parties that are capable of resolution by a court, but also prevents the judiciary from intruding into matters reserved for the executive and legislative branches. Thus, it protects the courts from becoming referees in every dispute between the political branches. To satisfy this constitutional requirement, known as Article III standing, a party must establish three things: (1) an injury-in-fact that (2) is fairly traceable to the defendant’s conduct and (3) is capable of being redressed by a court. This procedural requirement is the same for all lawsuits, whether they are filed by private citizens, executive branch officials, or Members of Congress. Demonstrating an injury-in-fact—an actual harm—is typically the biggest hurdle when it comes to disputes between the political branches. Most successful challenges have been filed by private parties who were demonstrably harmed by those actions, rather than Members of Congress whose institutional injuries, such as a diminution of their power as legislators, are deemed to be “abstract” and “widely dispersed.”¹²

In situations when the president has exceeded his authority and encroached on congressional prerogatives, the Supreme Court has been more receptive to challenges brought by private parties. For example, in a case brought by contractors who had not been paid by the postmaster general, the Supreme Court determined that the president may not refuse to follow an act passed by Congress. In *Kendall v. United States ex rel. Stokes*, the Court held that President Martin Van Buren could not instruct his postmaster general to refuse to pay contractors when Congress had passed a law directing payment.¹³ The Court noted that “[t]o contend that the obligations imposed on the President to see the laws faithfully executed, implies a power to forbid their execution; is a novel construction of the constitution, and entirely inadmissible.”¹⁴ Allowing Executive Branch officials to choose not to comply with a statutory mandate “would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power to control the legislation of congress, and paralyze the administration of justice.”¹⁵

In *Youngstown Sheet & Tube Co. v. Sawyer*, a steel company challenged President Harry Truman’s attempt to nationalize American steel mills to prevent a strike during the Korean War.¹⁶ Congress had explicitly rejected authorizing such seizures when the Taft-Hartley Act was debated in 1947, and instead allowed the president to seek an injunction for up to 80 days to head off strikes “imperiling the national health and safety.”¹⁷ The Supreme Court found that President Truman had exceeded his authority in seizing the steel mills. Writing for the majority, Justice Hugo Black noted, “In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits

his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.”¹⁸ Justice Black observed that the Constitution does not allow the president to “supervis[e] or control” Congress’s lawmaking power; instead, the Framers of the Constitution “entrusted the law making power to the Congress alone in both good and bad times.”¹⁹ In a concurring opinion, Justice Robert Jackson explained that the president’s duty to execute the law “gives a governmental authority that reaches so far as there is law.”²⁰

In the 1970s, President Richard Nixon refused to spend certain funds appropriated by Congress, claiming that a power of impoundment was inherent in his duty to faithfully execute the laws. In *Train v. City of New York*, the Supreme Court determined that Nixon’s Environmental Protection Agency administrator lacked the discretion to impound funds Congress had authorized when it amended the Federal Water Pollution Control Act.²¹ Indeed, while that case was pending, Congress passed the Congressional Budget and Impoundment Control Act of 1974, seeking to place restrictions on the president’s “impoundment” power. In another case involving Nixon’s “impoundment” power, the U.S. Court of Appeals for the D.C. Circuit stated that “historical precedent, logic, and the text of the Constitution itself obligate the [president] to continue to operate [the program] as was intended by the Congress....[N]o barrier would remain to the executive ignoring any and all Congressional authorizations if he deemed them, no matter how conscientiously, to be contrary to the needs of the nation.”²²

More recently, President Obama exceeded his authority by making recess appointments when the Senate was in session. Article II, Section 2 of the Constitution provides that the president may “fill up all Vacancies that may happen during the Recess of the Senate.” Otherwise, the president must receive the advice and consent of the Senate in order to appoint ambassadors, judges, and higher-level executive officers. In January 2012, President Obama made four “recess” appointments to the National Labor Relations Board and the Consumer Financial Protection Bureau, claiming that, since the Senate was conducting only periodic *pro forma* sessions, it was not available to confirm those appointees. During the time in which President Obama deemed the Senate “unavailable,” it passed and the president signed into law the Temporary Payroll Tax Cut Continuation Act of 2011. The Supreme Court ruled unanimously that President Obama had violated the Constitution. The majority opinion by Justice Stephen Breyer noted that the Senate “is in session when it says that it is,” and specified that a recess must last at least 10 days in order for the president to make a recess appointment.²³

Another recent case involved the Environmental Protection Agency’s regulation of stationary sources emitting greenhouse gases. In *Utility Air Regulatory Group v. Environmental Protection Agency*, the Supreme Court held that the agency exceeded its enforcement authority by “tailoring” the Clean Air Act’s specific requirements to “accommodate its greenhouse-gas-inclusive interpretation.”²⁴ Writing for the majority, Justice Antonin Scalia reiterated the “core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”²⁵ The agency’s authority to execute the law “does not include a power to revise clear statutory terms that turn out not to work in practice.”²⁶

Of course, there have been instances when Congress encroached on the president's prerogatives. For example, in *Lujan v. Defenders of Wildlife*, the Supreme Court determined that Congress may not authorize individuals to sue a government official for an alleged failure to enforce the law, despite their inability to demonstrate a separate injury resulting from that failure.²⁷ The majority opinion by Justice Scalia noted that Congress may not "transfer from the president to the courts the chief executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"²⁸ Likewise, Congress may not place onerous conditions upon the president's ability to remove officials for whom he is responsible,²⁹ although this does not always extend to quasi-legislative or quasi-judicial "independent" agencies.³⁰ Congress also may not seek to "control administration of the laws" by use of a post-enactment legislative veto.³¹ Nor may Congress circumvent the president's role in the appointment of judges by authorizing the chief judge of a specialized court to appoint trial judges.³² In many of these instances, the Supreme Court determined that Congress's efforts undermined the president's ability to faithfully enforce the law.

Administrative Agencies Exacerbate the Problem of Executive Overreach

Administrative agencies can exacerbate the problem of a president who seeks to expand his authority into Congress's realm. These bodies, which are generally housed within the Executive Branch, perform legislative, executive, and judicial functions by issuing, enforcing, and settling disputes involving regulations that have the force of law.³³ James Madison called such an accumulation of power in one body the "very definition of tyranny."³⁴ The modern administrative state, however, blurs the separation of powers and the system of checks and balances and has become an unaccountable fourth branch of government.

The Progressive Era led to the creation and strengthening of agencies like the Federal Trade Commission and the Food and Drug Administration; the New Deal brought the Securities and Exchange Commission, the National Labor Relations Board, and the Federal Communications Commission; the 1970s heralded the Environmental Protection Agency; and more recently has come the Consumer Financial Protection Bureau.³⁵ The result is that administrative agencies today "pok[e] into every nook and cranny of daily life."³⁶ Though the idea may have been to put impartial, scientific experts in charge of highly technical areas of regulation, more often than not, "political appointees, often not experts, are normally responsible for managing agencies and determining policy. And policy often reflects political, not simply 'scientific' considerations. Agency decisions will also occasionally reflect 'tunnel vision,' an agency's supreme confidence in the importance of its own mission to the point where it leaves common sense aside..."³⁷

In turn, Congress enacts "vast and vaguely worded legislation...grant[ing] broad discretion to regulatory agencies."³⁸ This allows Members of Congress to "claim credit for 'doing something' while evading blame for specific regulations."³⁹ Though the nondelegation doctrine prohibits Congress from delegating legislative functions to the Executive Branch, the Supreme Court has allowed Congress to delegate regulatory authority to agencies as long as Congress specifies an "intelligible principle" to guide the agency in the exercise of its discretion. To date, the Supreme Court has struck down only two statutes—both in the 1930s—as unconstitutional delegations because of Congress's failure to provide a sufficient "intelligible principle" to guide the applicable agency. Moreover, oversight from the executive or judicial

branches is limited. The president lacks the ability to actively supervise the myriad agencies,⁴⁰ and Congress has even insulated some “independent” agencies from Executive Branch control by limiting the president’s ability to remove agency heads at will. As President Truman put it, “I thought I was the president, but when it comes to these bureaucrats, I can’t do a damn thing.”⁴¹ Further, the courts should act as a check on abuse by the political branches when an appropriate case or controversy is before them. Yet courts rely on deferential doctrines in reviewing agency actions in an effort to avoid encroaching on the Executive Branch’s ability to administer the law. In fact, agencies prevail in the vast majority of cases involving various deference doctrines.⁴²

Thus, Congress creates an agency under the assumption that the president will supervise it; the president provides guidance to an agency on broad policy goals under the assumption that the courts will rein it in if necessary; and the courts defer to judgments made by agency officials under the assumption that this was what Congress intended. As a result of this vicious cycle, administrative agencies wield massive amounts of power with little oversight and are precisely the accumulation of power that Madison feared. Many instances of power grabs and expansive “interpretations” of law throughout the Obama Administration have emanated from agencies, including the Environmental Protection Agency, the Federal Communications Commission, and many others.⁴³

President Obama’s Executive Overreach

President Obama is not the first—nor is he likely to be the last—to be accused of abusing his authority. Indeed, when he was a candidate for the presidency, at a town hall event, Obama said, “The biggest problems that we’re facing right now have to do with George Bush trying to bring more and more power into the executive branch and not go through Congress....”⁴⁴ The history books are filled with these disputes, such as when President Andrew Jackson declared after an unfavorable Supreme Court decision, “[Chief Justice] John Marshall has made his decision; now let him enforce it.”⁴⁵ To be sure, there are examples of past presidents declining to fully enforce certain laws. It’s been alleged that George W. Bush did not fully enforce various environmental regulations,⁴⁶ Bill Clinton failed to enforce certain gun-safety laws,⁴⁷ and Ronald Reagan did not enforce the Sherman Antitrust Act.⁴⁸ Presidents Reagan, George H.W. Bush, and Clinton all issued deportation deferrals in response to specific humanitarian crises, each affecting fewer than 200,000 individuals.⁴⁹ As discussed above, President Nixon attempted to assert a “power of impoundment” to avoid spending congressionally appropriated funds. Going all the way back to our nation’s early years, Thomas Jefferson declined to enforce the Alien and Sedition Acts of 1798 because he believed them to be unconstitutional.⁵⁰

President Obama has not only declined to enforce certain laws, he has circumvented Congress on a number of occasions. This damages the separation of powers that the Framers of the Constitution so carefully delineated, and has positioned Obama as a super-legislator with the power to override the law. Two of the most publicized instances of this unilateral action have been delaying implementation of the Affordable Care Act and the deferred action policies granting relief from deportation and removal proceedings, as well as government benefits and work authorizations, for an estimated four million illegal aliens. Legal challenges against both actions are currently pending in court. There are, however, many other instances when President

Obama effectively changed or waived laws through unreasonable interpretations or otherwise bypassed Congress.

Immigration Reform: In 2012, the Department of Homeland Security implemented the Deferred Action of Childhood Arrivals program, enabling 1.7 million illegal aliens under 30 years old brought to the United States as children to apply for deferred deportation and work authorization. This program was expanded by, among other things, eliminating the age cap and increasing the term of deferred action and employment authorization from two to three years. Then in 2014, the department created the Deferred Action for Parents of Americans, conferring deferred action on illegal aliens whose children are U.S. citizens or lawful permanent residents, provided no other factors make deferred action inappropriate.⁵¹ In addition to lawful presence, deferred action recipients receive benefits such as work authorizations, driver's licenses, Social Security, and other government benefits, which is estimated to cost the states millions of dollars each year. Texas and 25 other states sued to enjoin the 2014 program. The district court granted injunctive relief on the ground that the states were likely to succeed on their claim that the implementation of this program violated the Administrative Procedure Act.⁵² The appellate court agreed and now the case is pending before the Supreme Court. In addition to the statutory claims, the states argue that this program violates the president's duty to faithfully execute the law because Congress never authorized the Obama Administration to make these changes to the existing immigration laws.

Healthcare Law: The Patient Protection and Affordable Care Act has undergone dozens of "revisions" since its passage in March 2010.⁵³ The U.S. House of Representatives filed suit challenging two of these changes in court. First, the House challenged the Obama Administration's delay of the employer mandate,⁵⁴ which generally required businesses employing 50 or more full-time employees to provide health insurance or pay a fine per each uncovered employee.⁵⁵ Section 1513(d) of the law provided that this employer mandate provision "shall apply to months beginning after December 31, 2013." Second, the House challenged the Obama Administration's payment of subsidies to insurance providers for providing cost-sharing reductions to certain policyholders, even though Congress never appropriated funds for these subsidies. Section 1402 of the law "requires insurers to reduce the cost of insurance to certain, eligible statutory beneficiaries" and the "federal government then offsets the added costs to insurance companies by reimbursing them with funds from the Treasury."⁵⁶ This section stated that cost-sharing offsets must be funded by annual appropriations. The House maintained that since it has not appropriated funds for Section 1402, the Administration violated Article I, Section 9, Clause 7 of the Constitution, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." A district court ruled last September that the House has standing to challenge the spending of funds not appropriated by Congress, but not the delay of the employer mandate.

Labor Law: The Obama Administration invented a labor law exemption that flatly contradicts a 1988 law. The Worker Adjustment and Retraining Notification (WARN) Act prohibits large employers from initiating statutorily defined mass layoffs unless they give 60-day advance notification to employees.⁵⁷ The Department of Labor (DOL) is responsible for issuing guidance to employers related to their WARN Act obligations. On July 30, 2012, the DOL issued a guidance letter telling employers that it was not necessary to issue notice to employees before

making layoffs resulting from the anticipated federal budget cuts commonly known as sequestration.⁵⁸ Further, the Office of Management and Budget (OMB) informed government contractors that the government would compensate them for legal costs, as determined by a court, if and when employees laid off during sequestration sued those contractors for lack of WARN Act notice.⁵⁹ Thus, not only did the DOL encourage employers to withhold notices that the WARN act would require if sequestration were to occur—an outcome all reasonable observers should have anticipated—but OMB also offered to reimburse those employers at the taxpayers’ expense if challenged for failure to give that notice. The WARN Act notices would have gone out days before the 2012 election, and some have suggested that the DOL guidance was drafted so that workers would not receive notice of impending layoffs because they might blame President Obama, thereby imperiling his re-election efforts.⁶⁰

Welfare Reform: In another instance of “creative” interpretation, the Obama Administration waived a key part of the 1996 welfare reform law. In 1996, Congress passed and President Bill Clinton signed into law a comprehensive welfare reform bill that conditioned receipt of welfare benefits on working or preparing for work under Section 407 of the Temporary Assistance for Needy Families program. This requirement was a huge success, reducing welfare rolls by 50 percent and the poverty rate for minority children dropped to the lowest levels in history. On July 12, 2012, however, the Department of Health and Human Services notified states of Secretary Kathleen Sebelius’s “willingness to exercise her waiver authority” so states could eliminate Section 407’s work participation requirement.⁶¹ This announcement contradicted the law, which unambiguously provided that waivers granted under other sections of the law “shall not affect the applicability of section 407 to the State.”⁶² As a result, in most states today, more than half of able-bodied welfare recipients are not working or preparing for work and state welfare agencies engage “less than [one] fifth of recipients in activities intended to increase employment and reduce dependence.”⁶³

Voting Rights: In advance of the 2012 election, Florida began an effort to clean up its voter rolls. In an attempt to remove non-citizens from the voter rolls, state officials compared the list of registered voters with state motor vehicle databases. A Justice Department attorney, however, sent a letter to Florida’s secretary of state saying that, pursuant to Section 5 of the Voting Rights Act, Florida must seek preclearance from the Department or a federal court in Washington, D.C., and that purging the voter rolls within 90 days of a primary or general election violates Section 8 the National Voter Registration Act (NVRA).⁶⁴ The Florida secretary of state responded that the state had already obtained preclearance for the relevant laws.⁶⁵ Pursuing its NVRA claim, the Justice Department sued Florida in federal court, seeking to enjoin the state from continuing its program. By the time the court issued its decision, Florida had voluntarily halted the program, but the judge commented that the NVRA “simply does not apply to an improperly registered noncitizen” and “does not prohibit a state from systematically removing improperly registered noncitizens” during the 90-day period before an election.⁶⁶ The law “does not require a state to allow a noncitizen to vote just because the state did not catch the error more than 90 days in advance.”⁶⁷ In another related suit, the court noted that “the NVRA does not require the State to idle on the sidelines until a non-citizen violates the law before the State can act.”⁶⁸ Such a reading of Section 8 would “produce an absurd result” in preventing states from removing “minors, fictitious individuals...and noncitizens” from its voter rolls.⁶⁹

Pro-Union Policies: As discussed above, President Obama made several recess appointments to National Labor Relations Board in January 2012, when the Senate was in session. The constitutional deficiency of these appointments was only the beginning of the problem. Once on the Board, the new appointees implemented a number of questionable policies that had been rejected by Congress, including requiring employers to post a list of “worker rights,” snap elections for union representations, and unionization by “card check.”⁷⁰

Federal Drug Law: The Obama Administration announced in 2009 that it would relax the enforcement of certain federal drug laws. On October 19, 2009, Deputy Attorney General David Ogden instructed the United States Attorneys in select states not to prosecute “individuals whose actions are in clear and unambiguous compliance with existing state laws” that legalize the use and possession of marijuana for medicinal purposes.⁷¹ The Controlled Substances Act bans the sale, possession, and use of Schedule I drugs, and even after years of lobbying, marijuana is still classified as a Schedule I drug.⁷² Regardless of the divergent views that people have about our nation’s drug laws and despite the fact that some states have passed laws legalizing the use and possession of marijuana, federal law is still the controlling law, which the president has an obligation to enforce. Further, the Supreme Court upheld the Controlled Substances Act as a valid regulation of interstate commerce and acknowledged that it prevails over state laws to the contrary.⁷³ Claiming prosecutorial discretion and acting under the guise of resource allocation, the Obama Administration chipped away at federal drug laws by refusing to enforce them in states where doing so might prove to be politically unpopular. Congress subsequently acquiesced to this change in the law in its 2014 and 2015 fiscal year appropriations, forbidding the Justice Department from seeking to undercut states that have passed laws legalizing the use and distribution of medical marijuana.⁷⁴

Refusing to Defend Federal Laws in Court: When President Obama took office, the Department of Justice initially followed the long-standing policy of defending the constitutionality of the Defense of Marriage Act (DOMA), which was being challenged in several courts. Historically, the Justice Department would defend all laws against constitutional challenges as long as reasonable arguments could be made in their defense. This was to “ensure[] the government speaks with one voice” and “prevent[] the Executive Branch from using litigation as a form of post-enactment veto of legislation that the current administration dislikes.”⁷⁵ In *Smelt v. United States* in 2009, the Obama Administration argued that “DOMA is rationally related to legitimate government interests and cannot fairly be described as born of animosity....”⁷⁶ Two years later, however, the Administration announced that it would no longer defend the constitutionality of DOMA, implying that there were no reasonable arguments in favor of DOMA’s constitutionality. Attorney General Eric Holder stated that the Administration would continue to enforce DOMA, while not defending it and later affirmatively attacking it in court. When *United States v. Windsor*, challenging the constitutionality of DOMA’s definition of marriage for purposes of federal law and benefits, reached the Supreme Court, the Bipartisan Legal Advisory Group of the U.S. House of Representatives defended the challenged provision. The Court found this provision unconstitutional, but the majority opinion by Justice Anthony Kennedy noted that it “poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress’ enactment solely on its own initiative.”⁷⁷

Conclusion

Chief Justice John Marshall wrote in *McCulloch v. Maryland*, “[T]he question respecting the extent of the powers actually granted [to the federal government] is perpetually arising, and will probably continue to arise, as long as our system shall exist.”⁷⁸ It is inevitable in our constitutional system that each branch of government will seek to expand its authority. That is why checks and balances were built into the design—making “ambition . . . counteract ambition.” While courts may adjudicate some disputes between the political branches, Congress should not rely on the courts to resolve every dispute with the president over the scope of their powers. Congress has the tools to resist the president’s intrusion into its sphere through appropriations, oversight hearings, and impeachment proceedings. The Senate has the additional tool of providing advice and consent on judicial and Executive Branch nominations, and this can include refusing to confirm nominees.

Congress also should think twice before making broad delegations of lawmaking authority to administrative agencies, since they often are insulated from oversight, and should find ways to increase agencies’ accountability and transparency, such as using the Congressional Review Act⁷⁹ or reforms like the perennially proposed Regulations from the Executive in Need of Scrutiny Act.⁸⁰ Regardless of who is elected as our next president, Members of Congress must work to reclaim their authority from the Executive Branch and administrative agencies. With any luck, the next president will take seriously the duty to faithfully execute the laws Congress has chosen to pass, and work with Congress to repair the damage to the separation of powers and the Constitution that has been done over these last seven years. It may be difficult to resist the temptation to copy President Obama’s actions. But for the sake of our liberties, Members of Congress should encourage the next president to comply with the limits the Constitution places on executive power.

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¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

² THE FEDERALIST No. 51 at 268 (James Madison) (Carey and McClellan ed., 2001).

³ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1555, at 413 (1833)

⁴ *The President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (Dec. 3, 2013) (statement of Professor Jonathan Turley), available at http://judiciary.house.gov/hearings/113th/hear_12032013.html.

⁵ This is the long-held view of the Office of Legal Counsel in the U.S. Department of Justice, which provides advice to the President on constitutional matters. See 14 U.S. Op. Off. Legal Counsel 37, 1990 WL 488469 (Feb. 16, 1990);

“[T]he bedrock principle was not legislative supremacy but popular sovereignty. The higher law of the Constitution might sometimes allow, and in very clear cases of congressional usurpation might even oblige, a president to stand firm against a congressional statute in order to defend the Constitution itself.” AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 179 (2005).

⁶ *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 612 (1838).

⁷ *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013).

⁸ See Robert Delahunty & John Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEXAS L. REV. 781, 792–94 (2013).

⁹ *Clinton v. City of New York*, 524 U.S. 417, 428, n. 12 (1998).

¹⁰ See *Marbury*, 5 U.S. (1 Cranch) at 137.

¹¹ *Wayte v. United States*, 470 U.S. 598, 607 (1985).

¹² *Raines v. Byrd*, 521 U.S. 811, 829 (1997).

¹³ *Kendall*, 37 U.S. at 524.

¹⁴ *Id.* at 613.

¹⁵ *Id.* at 612.

¹⁶ 343 U.S. 579 (1952).

¹⁷ *Id.* at 704 (Vinson, C.J. dissenting).

¹⁸ *Id.* at 587.

¹⁹ *Id.* at 589.

²⁰ *Id.* at 647.

²¹ 420 U.S. 35 (1975).

²² *Local 2677, Am. Fed’n. of Gov’t. Emp. v. Phillips*, 358 F. Supp. 60, 76–77 (D.D.C. 1973).

²³ *NLRB v. Noel Canning*, 134 S.Ct. 2550, 2574 (2014).

²⁴ *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2446 (2014).

²⁵ *Id.*

²⁶ *Id.*

²⁷ 504 U.S. 555 (1992).

²⁸ *Id.* at 577.

²⁹ *Myers v. United States*, 272 U.S. 52, 163–64 (1926) (“Our conclusion on the merits, sustained by the arguments before stated, is that Article 2 grants to the President the executive power of the government—i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed.”).

³⁰ *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

³¹ *INS v. Chadha*, 462 U.S. 919, 953 n. 16 (1983) (“Congress’ authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a Congressional veto.”).

³² *Freytag v. CIR*, 501 U.S. 868 (1991).

³³ See Elizabeth Slattery, *Who Will Regulate the Regulators? Administrative Agencies, the Separation of Powers, and Chevron Deference*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 153 (May 7, 2015), available at <http://www.heritage.org/research/reports/2015/05/who-will-regulate-the-regulators-administrative-agencies-the-separation-of-powers-and-chevron-deference>.

³⁴ THE FEDERALIST No. 47, at 298 (Clinton Rossiter, ed. 2003).

³⁵ See Joseph Postell, *From Administrative State to Constitutional Government*, HERITAGE FOUNDATION SPECIAL REPORT No. 116 (Dec. 14, 2012), available at <http://www.heritage.org/research/reports/2012/12/from-administrative-state-to-constitutional-government> (history of administrative and independent agencies).

³⁶ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).

³⁷ Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2190–91 (2011).

³⁸ James Gattuso & Diane Katz, *Red Tape Rising: Five Years of Regulatory Expansion*, HERITAGE FOUNDATION BACKGROUNDER No. 2895 (Mar. 26, 2014), available at <http://www.heritage.org/research/reports/2014/03/red-tape-rising-five-years-of-regulatory-expansion>.

³⁹ *Id.*

⁴⁰ The Office of Management and Budget provides oversight of agencies and reports directly to the President. Likewise, most agencies have an inspector general that is tasked with identifying abuses.

- ⁴¹ *City of Arlington*, 133 S. Ct. at 1878.
- ⁴² See William Eskridge, Jr. & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1129 (2008) (Looking at cases invoking *Chevron* deference since its inception in 1984 through 2006, agencies prevailed in 76 percent of cases.).
- ⁴³ See, e.g., Commissioner Ajit Pai, The FCC and Internet Regulation: A First-Year Report Card, Remarks at the Heritage Foundation (Feb. 26, 2016), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0226/DOC-337930A1.pdf.
- ⁴⁴ *Obama 2008: "I Intend To Reverse" Bush Bringing "More And More Power Into the Executive,"* REAL CLEAR POLITICS (Feb. 13, 2014), http://www.realclearpolitics.com/video/2014/02/13/obama_2008_i_intend_to_reverse_bush_bringing_more_and_more_power_into_the_executive.html.
- ⁴⁵ Supreme Court History: The First Hundred Years, pbs.org, <http://www.pbs.org/wnci/supremecourt/antebellum/history2.html>.
- ⁴⁶ See John Solomon & Juliet Eilperin, *Bush's EPA Is Pursuing Fewer Polluters*, WASH. POST (Sept. 30, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/29/AR2007092901759.html>.
- ⁴⁷ Americans for Gun Safety Foundation, *The Enforcement Gap: Federal Gun Law Ignored* (May 2003), http://content.thirdway.org/publications/10/AGS_Report_-_The_Enforcement_Gap_-_Federal_Gun_Laws_Ignored.pdf.
- ⁴⁸ Mark Roszkowski, *The True Reagan Antitrust Legacy: The End of Intra-brand Competition*, ANTITRUSTSOURCE.COM (Mar. 2005), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/05_mar05_roszkowski323.authcheckdam.pdf.
- ⁴⁹ Drew Desilver, *Executive actions on immigration have long history*, PEW RESEARCH CENTER (Nov. 21, 2014), <http://www.pewresearch.org/fact-tank/2014/11/21/executive-actions-on-immigration-have-long-history/>.
- ⁵⁰ Letter from Thomas Jefferson to William Duane (May 23, 1801), *available at* <http://founders.archives.gov/documents/Jefferson/01-34-02-0130>.
- ⁵¹ Memorandum from Jeh Johnson, Sec'y, U.S. Department of Homeland Security, to Leon Rodriguez, Director, USCIS, et al. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.
- ⁵² *Texas v. United States*, 86 F.Supp.3d 591 (S.D. Texas Feb. 16, 2015).
- ⁵³ Grace-Marie Turner, *Seventy Changes to Obamacare... So Far*, GALEN INSTITUTE (Jan. 26, 2016), <http://galen.org/assets/70-changes-so-far-to-ObamaCare-1.pdf>.
- ⁵⁴ Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEP'T. OF THE TREASURY, TREASURY NOTES (Jul. 2, 2013), <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx>.
- ⁵⁵ 26 U.S.C. § 4980H (2015).
- ⁵⁶ *U.S. House of Representatives v. Burwell*, -- F.3d --, 2015 WL 5294762, *3 (D.D.C. 2015); 42 U.S.C. § 18071(a)(2)(2010).
- ⁵⁷ 20 U.S.C. § 2102(a)(2012).
- ⁵⁸ Letter from Jane Oates, Ass't Sec'y, U.S. Dep't. of Labor, to State Workforce Agencies, Administrators, and Liaisons (July 30, 2012).
- ⁵⁹ Memorandum from Daniel Werfel, Controller, Office of Fed. Financial Mgmt., to Chief Financial Officers and Senior Procurement Executives of Executive Departments and Agencies (September 28, 2012). Employers are under no statutory obligation to send out these notices; if they do not, however, they are prohibited by law from ordering plant closings or issuing mass layoffs.
- ⁶⁰ Kedar Pavgi, *Employees Sue Contractor Over Sequestration Layoffs*, GOVERNMENT EXECUTIVE (June 20, 2013), <http://www.govexec.com/contracting/2013/06/employees-sue-contractor-over-sequestration-layoffs/65249/>.
- ⁶¹ Memorandum from the Office of Family Assistance, Dep't. of Health & Human Serv. to States administering TANF Program (July 12, 2012), *available at* <http://www.acf.hhs.gov/programs/ofa/resource/policy/fim-ofa/2012/im201203/im201203>.
- ⁶² 42 U.S.C. § 615(a)(2)(B)(2012).
- ⁶³ Robert Rector & Rachel Sheffield, *Setting Priorities for Welfare Reform*, HERITAGE FOUNDATION ISSUE BRIEF No. 4520 (Feb. 24, 2016), *available at* <http://www.heritage.org/research/reports/2016/02/setting-priorities-for-welfare-reform>.

⁶⁴ Letter from T. Christian Herren, Chief of the Voting Section, U.S. Dep't. of Justice, to Ken Detzner, Florida Sec'y of State (May 31, 2012); The NVRA is codified at 42 U.S.C. § 1973gg-6(c)(2)(A)(2012).

⁶⁵ Letter from Ken Detzner, Florida Sec'y of State, to T. Christian Herren, Chief of the Voting Section, U.S. Dep't. of Justice (June 6, 2012). The Supreme Court struck down the coverage formula of Sec. 5 of the Voting Rights Act, *Shelby County v. Holder*, 133 S.Ct. 2612 (2013).

⁶⁶ *United States v. Florida*, 870 F.Supp.2d 1346, 1350 (N.D. Fla. 2012).

⁶⁷ *Id.*

⁶⁸ *Arcia v. Detzner*, 908 F.Supp.2d 1276, 1283 (S.D. Fla. 2012).

⁶⁹ *Id.* at 1282.

⁷⁰ *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013) (invalidating the poster rule); *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013) (invalidating the poster rule); *Chamber of Commerce v. NLRB*, No. 12-5250 (D.C. Cir. 2013) (appeal pending from lower court decision striking down snap elections rule; subsequently dismissed); see Sean Higgins, *NLRB Nominee: Agency Could Not Enact Card Check on Its Own*, WASH. EXAMINER, July 23, 2013. Pro-union groups have long lobbied Congress to mandate unionization by card check, which would allow unions to avoid election by secret ballot and instead unionize by having employees publicly sign membership cards. In 2007, the NLRB ruled that employees who recently used card check had the right to immediately force a secret vote on whether they really wanted to join that union. *Dana Corp.*, 351 NLRB 434 (2007). Once President Obama packed the NLRB, it promptly overturned *Dana Corp.*

⁷¹ Memorandum from David Ogden, Deputy Att'y Gen., to Selected U.S. Att'y's, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <http://www.justice.gov/opa/documents/medical-marijuana.pdf>.

⁷² 21 U.S.C. § 812(b)(1)(2012).

⁷³ *Gonzalez v. Raich*, 545 U.S. 1 (2005). Many scholars have criticized the Court's broad reading of the Commerce Clause to reach what they agree is wholly local conduct, but it remains binding precedent.

⁷⁴ Steph Sherer, *Congress Extends 'Ceasefire' on Medical Marijuana, but Can They Clear the Smoke?* HUFFINGTON POST (Dec. 21, 2015), http://www.huffingtonpost.com/steph-sherer/congress-extends-ceasefire_b_8853606.html.

⁷⁵ Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 K.Y.L.J. 485, 502 (1995).

⁷⁶ Defendant's Motion to Dismiss at 25, *Smelt v. United States*, Case No. SACV09-00286 DOC (C.D. Cal. 2009) (internal quotation omitted).

⁷⁷ *United States v. Windsor*, 133 S.Ct. 2675, 2688 (2013).

⁷⁸ 17 U.S. 316, 405 (1819).

⁷⁹ 5 U.S.C. § 801-808 (1996).

⁸⁰ H.R. 427 114th Cong. (2015). The most recent version of this bill passed the House on July 28, 2015 and was placed on the Senate Legislative Calendar on December 21, 2015.

Mr. KING. Thank you, Ms. Slattery, for your testimony.

And I thank all the witnesses for your testimony.

We'll now proceed under the 5-minute rule with questions. And I'll begin by recognizing myself for 5 minutes.

And I'd turn, first, to Ms. Papez. Could Congress, in thinking about the Federal exchanges that were wished for by the Obama administration, conferred by the Supreme Court, could Congress discipline that by simply blocking funding to the Federal exchanges through an appropriations process?

Ms. PAPEZ. I certainly think that's one way that this body could do that, presuming the legislative solution didn't work in the first place as the Supreme Court, I guess, concluded the opinion. By the way, I have it here, the *King v. Burwell* majority opinion, in response to Mr. Lazarus.

I don't know about the deference point. I mean, the Court does, at page 8, cite the Chevron doctrine, the Constitution underlies that, all the way through the end of the opinion *Marbury v. Madison*. And the Court concludes that the text is ambiguous, which is something the dissent obviously debates, and then it says that it's resting its opinion on what Congress meant or what the Court thinks Congress meant.

And I think that's the issue. I think the first line response should be hopefully the legislation is clear enough. In this case, some would argue it was. And if it isn't, then perhaps appropriations is the next step or an amendment to make clear what apparently some other branches found unclear.

Mr. KING. Well, am I just imagining a happier world that a Supreme Court would have looked at the plain language in the Affordable Care Act and realized it was missing three words—"or Federal Government"—and wrote a decision that it doesn't include the—it doesn't lawfully allow the Federal Government to establish an exchange, and then simply send it back to Congress for the discretion of Congress to decide whether or not to act?

Ms. PAPEZ. It's interesting you raise that point. So the Court did obviously purport to look at the text. It concluded the text was ambiguous, which is what then allowed it to go on and say: Well, let's decide what we think Congress really had in mind.

Interestingly, to your point, the Court in that analysis relied on the prospect of State, you know, death spirals and asked the Solicitor General. Justice Scalia, actually, the late Justice Scalia asked this question. He said: Why couldn't this work exactly as you said, it could go back to the Congress. And the Solicitor General candidly said: I don't think we could get it done that way. So this was an example of sort of a Realpolitik invading the court, although the opinion doesn't quite read that way, obviously.

Mr. KING. It just seems to be, and it causes me to think about this, if the Supreme Court's involved in deep policy effect deliberations and then configuring decisions so it brings about their preferred policy result, I wonder if this Congress could just simply make our own ruling on the Constitution and ignore the court.

But I won't ask you to answer that question. I'd instead turn to Mr. Blackman.

Because I wanted to dig a little deeper into your statement about the narrative of the Congress that was prepared to mirror the wish

of the President, who said he would veto the bill if it got to his desk, but within an hour of the time that that might have happened then issued his executive edict, which was a verbatim copy of what was on the way to the desk as a proper legislative act of Congress. How would you interpret that?

Mr. BLACKMAN. So what's stunning about the Affordable Care Act is how the law has been amended by executive action. It's indeed the case that this body considered laws that would have delayed the employer mandate. This body has considered laws that delayed the individual mandate. And rather than working with Congress, the President said: I will veto them.

Now, I'll give the President some credit. The reason why he did that was he was afraid that various amendments would be attached saying: Okay, if you delay the individual mandate, repeal the Medical Device Tax, repeal that, repeal that.

That's part of the process, right? You don't get everything you want. So rather than risk the law being amended by the duly enacted process, the President said: I'm going to veto that, and, oh, by the way, I'm going to issue an executive action that does exactly that, and, by the way, this relieves Senators of taking a difficult vote.

Because the President takes these actions, it relieves the Congress of actually engaging in this process, and this is actually very deleterious to the rule of law, because now Congress is not even part of it. Yes, Congress has voted to repeal the ACA 60-odd times, but there were provisions that would have been actually modified to the benefit of Americans, and because of that, the President disregarded this process.

Mr. KING. There were some times that we wanted to help him with it on both sides of the aisle, and in this case, I took the President's actions to mean him saying: I am the executive and the legislative branch of government, and you, Congress, don't be sticking your nose in the legislative portion that the President wanted to conduct.

And so I'd just turn to Mr. Lazarus, and quickly, please, the same question that I asked Ms. Papez. Why didn't the Supreme Court just read the ACA plainly and clearly and sent it back to this Congress say: If you want to have Federal exchanges, you're going to have to add the language to the bill.

Mr. LAZARUS. I'm very pleased to have an opportunity to answer that question. The challengers in that case focused entirely on one four-word phrase, which you quoted. What the Supreme Court said, and in agreement with the Administration, is, yes, we have to look at what the text of the statute says, but we have to look at the text of the whole statute. We construe statutes, not individual words or phrases.

And when we look at the overall text of the statute, there are many provisions which make it clear that you couldn't construe that one four-word phrase in a way that would make the entire statute fail.

What the Chief Justice said—and I think it's very important, because, again, it's an approach, it was adopted as an interpretation by the Court, and it will apply to other cases—in every case we must respect the role of the legislature and take care—take care—

not to undo what it has done. Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the act in a way that is consistent with the former and avoids the latter.

Mr. KING. Thank you, Mr. Lazarus.

Mr. LAZARUS. That's the approach that the Court took. It's not ignoring the act, it's actually reading the act as a whole.

Mr. KING. Thank you.

The Chair now recognizes the Ranking Member from Tennessee, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chair.

Mr. Lazarus, how have the actions of this President and President Bush, Reagan differed as far as constitutional reach taking?

Mr. LAZARUS. Well, again, I think that if you look, if you peel back the allegations of lawlessness and so forth and you look at the actual record, you really see that the President's implementation of the ACA and his implementation of the immigration laws exercises discretion in ways that all previous Administrations have done and have been upheld by the courts in so doing.

I might point out, Chairman Goodlatte, if you look at exactly the same issue of the New England Journal of Medicine from which you quoted one article, there is an article by myself and Professor Tim Jost which explains how, in detail, what the Administration did to phase in the employer mandate is indistinguishable from what President Bush did to phase in the prescription drug benefit. His HHS Secretary, Bush's HHS Secretary said delaying the employer mandate was wise and explained why they had had to do the same thing.

The same thing has happened with respect to environmental laws. The Clinton administration had to delay implementation of a whole lot of statutory deadlines. It has to be done sometimes. And exercising that kind of judgment is really what the Constitution expects of the President.

And the same thing is true in the immigration law context. The precedents are even clearer. And President Bush actually conferred the equivalent of deferred action on 40 percent of then undocumented persons in the United States, which is the same percentage that's affected by DAPA. So we're really talking here about practices that have been going on and have been endorsed by Congress for decades.

Mr. COHEN. We know that consistency is the hobgoblin of small minds and we don't want to be considered that. But were there congressional hearings over the actions of President Bush or President Reagan on the immigration policies that they used?

Mr. LAZARUS. Well, the Reagan administration, for example, adopted an important regulation that recognized work authorization, which is one of the things that people are complaining about with respect to DAPA. That was adopted. Yes, it was adopted with proper notice and comment proceedings administratively. And then it was subsequently endorsed in a statute in 1986 by the Immigration Reform and Control Act, I believe it is.

So there really was a dialogue. There's always been a dialogue between Congress and Administrations over immigration policy.

It's been ongoing, and Administrations have exercised discretion. Sometimes that discretion has been endorsed subsequently.

I do want to point out one thing. I attached a letter to my testimony, which was sent in 1999, it was signed by 28 Members of Congress, including four distinguished gentlemen whose portraits are on the walls above us, Congressman Sensenbrenner, former Chairman Smith, former Chairman Conyers, and former Chairman Henry Hyde. This letter recommended to Attorney General Reno and INS Commissioner Meissner that the INS adopt guidelines for the use of prosecutorial discretion in removal proceedings in order to promote consistency in individual removal decisions.

And I have to point out, Chairman King, that discretion does not mean every individual enforcement official gets to do whatever they want to do. Discretion is conferred on the President and on the department head. And when they decide that the best way to implement something requires at least presumptive respect for certain guidelines, and they make that transparent in writing those guidelines out, that's exactly what your predecessors and some of you in person recommended and quite properly so.

Mr. COHEN. Thank you. And I yield back what I don't have.

Mr. KING. I thank the gentleman from Tennessee and recognize the Chairman of the full Committee, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Blackman, let's follow up on the discussion we just had. If a President can unilaterally suspend immigration laws for at least 4 million people by using the discretion that's almost always granted of prosecutorial discretion, meaning the hard case, the tough case you have discretion about whether or not to pursue that case, if that can be taken to swallow up the law by granting prosecutorial discretion and suspension of the laws for 4 million people, what limiting principle could stop the President from granting, for example, capital gains tax amnesty to the almost 3 million households who make more than \$250,000 a year?

Mr. BLACKMAN. So this is the million-dollar question that the government does not like answering—what is the limiting principle? The short answer is there is none, right? If the argument is, "Due to Congress' lack of resources I can't enforce every action and I'm going to simply prioritize," the President can say, "instead of going after capital gains tax, I'm going to go after people who don't file tax returns at all, I can't go after everyone, this is a category of people that I don't deem particularly dangerous, much worse is people who don't file any returns," there isn't.

Indeed, the Attorney General's argument with respect to deferred action for immigration doesn't have much of a limiting principle. The fact that the President chose people without criminal backgrounds and people who are generally upstanding human beings is nice, but that doesn't have to be the answer. What we effectively have here is a very dangerous slippery slope.

And if I may respond to a point my friend Mr. Lazarus made, this is a job for Congress. When I'm writing briefs I'll make argument with the courts, but, fortunately, here I am today talking to Congress. This body needs to reassert itself in the separation of powers. And if it actually views the President taking these actions, they should do something about it.

The mere fact that past Presidents have done stuff and Congress didn't object does not make it constitutional, right? This is like when your kid starts jumping up and down on the bed and you say, "Stop it, stop it, stop it," and he says, "Well, Daddy, I've done this before," right? That doesn't necessarily make it right. Past practice is helpful but it does not by itself render it constitutional. And I think this body has a duty to try and reinsert itself.

Mr. GOODLATTE. So the correct answer is, if the President says, "Well, I don't know what the limit of prosecutorial discretion is, I think it could include 4 or 5 million people," the response of the Court at the case that's now on its doorstep and the Court has said, "We want to also look at the question," they asked the parties to brief the question of what the take care clause provision means to this case, the response of the Court should be, "If you're not sure what that limit is, you shouldn't come to us, the United States Supreme Court, you should go to the United States Congress, because the Congress under Article I writes the laws. And if you're uncertain about the limit of that law, you should go back to Congress for direction on that, not come to the Court." Is that—

Mr. BLACKMAN. Absolutely. Yes, sir. I mean, in the ObamaCare case in 2012, which the government won, they could not identify a limiting principle in the commerce power. And the court said, "You know what? If you won't draw a line, we'll draw it for you." I will be very pleased if the Court takes up the take care issue and actually writes about this, because, indeed, the President has not seen fit to have any sort of line of what he can and cannot accomplish through prosecutorial discretion.

Mr. GOODLATTE. So, Ms. Papez, taking a step back from that individual case, what do you think are the best reforms for us on this Task Force to consider that would restore the role of Congress as originally understood?

Ms. PAPEZ. Well, you know, again, it's a hard question. I think there are several tools at the legislature's disposal that, you know, could be brought to bear in light of some of the recent court decisions.

I think something like the ACA illustrates the difficulty. I would imagine there are many in Congress who thought that the provision that the Supreme Court found ambiguous was indeed clear. So I think part of the job is going to be looking at some of these decisions and saying, "What can we do differently going forward as a legislative matter, number one?"

But the second piece is the power of the purse, right, and the spending power. I think that's an area where there is really no debate. Both sides of the aisle would agree that that power is constitutionally vested in the Congress. And so making appropriations very clear and using the oversight process to discipline executive branch spending and budgetary decisions is another powerful way to do it. Because, again, if there is a debate about how the legislation, what it means or how it was written, and there is not going to be a process of coming back to the legislature to revise the statute, the one way that I think Congress can and perhaps should compel that is with the power of the purse.

Mr. GOODLATTE. Thank you.

Ms. Slattery, do you want to comment on that as well?

Mr. Lazarus. Thank you for the opportunity.

Mr. GOODLATTE. I think I said Ms. Slattery. Thank you.

Mr. LAZARUS. Oh, I'm sorry. Okay.

Ms. SLATTERY. I would say an important first step is changing the culture in Congress by holding hearings like this one, getting out of the habit of delegating broad amounts of authority to unaccountable agencies, by not pinning their hopes on the courts to resolve problems with the executive branch, and using the tools that Ms. Papez also mentioned.

Mr. GOODLATTE. Thank you very much.

Thank you, Mr. Chairman.

Mr. KING. The Chairman returns his time.

And now I recognize the Ranking Member of the full Committee for his 5 minutes, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. Lazarus, can we get your view on prosecutorial discretion?

Mr. LAZARUS. Yes, you can. And also I apologize once again for misinterpreting who was being asked the question by Chairman Goodlatte.

I think the question was asked, what are the limits on prosecutorial discretion and is the Obama administration setting examples where there are no limits? And the answer to that is, no, there are limits.

I would want to point out that in the immigration area Congress has given the executive branch a great deal of discretion. And so that already is a limiting principle, the amount of discretion that the executive branch has and has traditionally had in immigration, which may be partly constitutionally based, but it is largely statutory, and you have done it.

I should just say, in the Homeland Security Act of 2002, which many of you must have voted for, you, Congress, directed the Secretary of DHS to establish national immigration enforcement policies and priorities. There it is, that's his responsibility.

So I think there's a lot of agreement here actually that these issues we are debating are really mainly issues that belong in the political arena and belong between the President, the executive branch and Congress, and not in the courts. If Congress thinks that that grant of discretion is too broad, then Congress has the ability to try to do something about that, and you can do it.

So the fact that the President has a huge amount of discretion in the immigration area does not necessarily mean that the same degree of discretion exists in other areas. And, again, in the ACA area what we have is phasing in, not suspending or refusing to enforce. All Administrations have to do this because it is not always possible to comply with effective dates.

So I think that the concerns about not only that the Administration is acting lawlessly, but is setting precedents about abusing discretion that are worrisome, I don't think that that's true, but I do think that it is something for Congress and the executive branch to work out and not something to dump in the courts.

Mr. CONYERS. Now, some of the critics have said that the President's oral comments urging Congress to pass comprehensive immigration reform means that he himself may not believe that DACA

and DAPA are legal. Do you think the President may have contradicted himself, as his critics assert?

Mr. LAZARUS. Well, I think that what happened is that the President was hopeful that Congress would adopt comprehensive immigration reform. After all, the Senate passed it, and, after all, people felt that if the Senate bill ever got on the floor of the House, it would also pass the House. So there was reason to be encouraging that result.

When he figured out that this was not going to happen, because then Speaker Boehner told him it was not going to happen, he ordered an extensive legal review of what authority he did have. I think that was the exactly responsible thing for him to do, it is exactly what is contemplated when the Constitution directs him to take care that the laws are faithfully executed.

And as a result of that long, I think it was like 9-month analysis that resulted in a very careful memorandum from the Office of Legal Counsel and Justice, he decided that he had the authority to do what he did in DACA and DAPA. And as I said, I believe that what he did is clearly within his discretion, very much in line with what previous Republican as well as Democratic administrations have done, and will be upheld by the Court.

Mr. CONYERS. Let me ask you this quickly about the strict conditions as to who qualifies for a green card and that the President effectively nullifies congressional decisions by granting a legal status without Congress acting. Are his critics right in saying that he's being in some ways out of line or contradicting himself when he can act in this way?

Mr. KING. The gentleman's time has expired. The witness will be allowed to answer the question.

Mr. LAZARUS. The answer is no. DAPA does not confer legal status, it does not confer amnesty. It provides for deferred action for people who are not going to be removed in any event, and everyone knows that, the courts have all acknowledged that. So it is a very different thing. It doesn't contradict what Congress wouldn't do. It acts in a very limited way basically to codify temporarily what was going to be the reality on the ground anyway.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. KING. The gentleman returns his time.

The Chair now recognizes the gentlemen from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you.

I think we just heard one of our problems. Mr. Lazarus, when you say all acknowledge that, that's simply not true; and I'm one who does not acknowledge that. And we have people running for President, who are doing well, who have not acknowledged what you said.

And when you say that the President was told that the law was not going to be passed by Speaker Boehner, then he decided to see how far he could go basically. And it appears what was not written in the memos is that basically, Mr. President, you can do just about anything because Harry Reid's got your back in the Senate. So, even though the House is going to rise up and try to enforce existing law as it is, Harry Reid will not let them enforce the law as

it is, so you can pretty much get away with whatever you want to do.

And I think that when the book is written about the rise and fall of the freest, greatest country—with more opportunity, least imperialistic—testimony in this hearing could be very helpful as your statement talking about the President, he decided he had authority to do what he did.

That is what happens when, as Ben Franklin said, you know, giving you a republic if you can keep it. You can only keep it if the top leaders are kept in check with checks and balances. But when the top leaders feel there are things they can do and not be stopped, they have authority, basically because they won't be stopped, then that is when the checks and balances break down.

Now, Ms. Papez, you were mentioned by Mr. Lazarus, and your demeanor, your countenance appeared to change. I mean, I used to be a judge. I have watched lawyers' appearance. Did you have a response that you have not made to what he said when your name was invoked?

Ms. PAPEZ. I think we agree on a lot of things. The one point that did jump out about Mr. Lazarus' testimony, it is in the written statement too, is that he has on page 14 of his paper a statement that says: Where is the Constitution in all of this? And his answer is it's nowhere. I think we do disagree on that. I think it is everywhere. I think you see it in the court decisions we've been talking about. And I think you see it in this hearing, and I think both sides have acknowledged that. So that's the one place I think we might part company a bit.

Mr. GOHMERT. Alright.

And, Ms. Slattery, you mentioned Mr. Lazarus' statement giving credit for your sense of humor. Could I ask you to elaborate on what you meant by your sense of humor when you talked about a terrible, horrible, no good, very bad day for conservatives who pinned their hopes on blocking ObamaCare on the Supreme Court?

Ms. SLATTERY. Sure, I'm happy to. That was a blog response for the Heritage Foundation the day that the *King v. Burwell* decision came out. And I would just like to respond to what Mr. Lazarus said.

Mr. GOHMERT. Please, please.

Ms. SLATTERY. Yes. Essentially, I think he's characterizing the lawsuit as something that's nakedly partisan, but I think even Chief Justice Roberts acknowledged that the challengers had good statutory arguments and, in fact, theirs were better if you look at the plain text of statute. But the Court, the majority, unfortunately, chose to look at the aspirations of what they thought Congress wanted rather than the law that Congress actually passed.

Mr. GOHMERT. Well, any time you have any Justice—and particularly in this case the Chief Justice—who writes around page 14 or 15 of his decision that Congress knows best whether something is a tax or a penalty and it is only imposed if conduct occurs that Congress does not want to happen, or in this case they don't buy an insurance policy that Congress wants them to buy, clearly it is a penalty. It is not a tax, because if it were a tax, the Anti-Injunction Act would apply, the plaintiff would not have standing, and we would not have jurisdiction. So, it is clearly a penalty, and it is not

a tax. And since it is a penalty and not a tax, we have jurisdiction, plaintiff has standing, and we can go on to consider the merits.

And then 40, 50 pages later, that same judge that's smarter than this, loses his intellectual integrity by saying clearly this is a tax, and that's why it needs to be saved. And, yes, we lawyers know we can play games and say it can be one thing under one law and a different thing under another, but the Supreme Court lost its integrity. And this is the way you lose a republic that Ben Franklin and his friends gave us.

I yield back.

Mr. KING. The gentleman yields back.

The Chair would now recognize the gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman.

I think sometimes the rhetoric we hear about the President's immigration actions is a bit overheated and that's unfortunate, because I think it confuses the public about what's actually occurred. And I hear some of the things that are being said around the country, and even in Congress. And I think if you don't like what's happened, look in the mirror, because if you take a look how much money we've appropriated every year, it's less than would be necessary to remove everybody who is undocumented in the country. In fact, we appropriate about less than 4 percent of what would be necessary to remove every person who lacks lawful status in the country.

And as you've mentioned, Mr. Lazarus, we have repeatedly delegated to the Administration the obligation to prioritize who should be removed in light of the fact that we have failed to appropriate funds sufficient to remove everyone. In 1952, we authorized the executive to establish such regulations, issue such instructions, perform such other acts as he deems necessary for carrying out his authority. And as you've mentioned in 2002, when we adopted the Homeland Security Act, we explicitly charged the Secretary of Homeland Security with the obligation to "establish national immigration enforcement policies and priorities."

Now, when you put the appropriations level together with the explicit obligation to the Secretary to figure out what to do, it's pretty clear, if you don't like what's happening, look in the mirror. It's what we asked him to do.

Now, some have said that the work authorization is a problem. Well, once again, look in the mirror. When President Reagan was President in 1981, they codified the rule, providing the administrative practice granting work authorization to people who had received deferred action. And in IRCA, 1986, Congress explicitly recognized the authority of the Attorney General and now the Secretary of Homeland Security to do exactly that.

So I guess my question to you, Mr. Lazarus, is, is this an unlawful delegation to the Administration? Has Congress unlawfully delegated this?

Mr. LAZARUS. I think we're pretty far past the days when the Supreme Court is brandishing the nondelegation doctrine about it. That's about 100 years out of date.

No, it is not an unlawful delegation. It's

a perfectly sensible delegation and it's one that's been working for many years. And as I said, it's been an ongoing dialogue between Congress and the immigration enforcement authorities as to how this should be used. And as I also pointed out, a dialogue in which a very significant contribution was made by Members of this Committee and other Members of Congress in 1999.

Ms. LOFGREN. Right.

May I ask you another question? Now, ordinarily the Administrative Procedures Act does not require rulemaking when you take discretionary actions. If it did, every time the Attorney General decided not to prosecute a particular person you'd have to do 90-days of rulemaking. Do you think these discretionary actions required rulemaking under the Administrative Procedures Act?

Mr. LAZARUS. I certainly do not. The Fifth Circuit decision that the Justice Department is appealing to the Supreme Court that held that the Administrative Procedure Act required DAPA to be done through a notice and comment rulemaking made that point based on an allegation that the DAPA guidelines were binding—binding, I guess, on the public.

Ms. LOFGREN. Right.

Mr. LAZARUS. They certainly are not—and that the references that are replete throughout the DAPA memoranda that individual officials retain case-by-case discretion to apply the guidelines but also to look at other factors in the public interest, were pretextual. Now, this was before it had even been put into effect.

Ms. LOFGREN. Right. Mr. Lazarus—

Mr. LAZARUS. It is really an outrageous interference with executive authority, I think.

Ms. LOFGREN. It would change the presidency forever, I think.

I just want to close with this. I'd like unanimous consent to put page 16 of the Committee report from August 28, 1985, into the record. And here's what the Committee said: "It's the intent of the committee that the families of legalized aliens will obtain no special petitioning rights by virtue of the legalization. They will be required to wait in line in the same manner as the immediate family members of other new residents."

Following that, President Reagan decided to grant amnesty, if you will, to the family members who had been specifically excluded by the legislation and he did so by a grant of deferred action. It was about 40 percent of the population, the same general percentage as what we're talking about today, and also provided work authorization.

With that, I would yield back. And I ask unanimous consent to put this in the record.

Mr. KING. The unanimous consent request has been accepted. Without objection, it will be entered into the record.**

The Chair will now recognize the gentleman from Idaho, Mr. Labrador.

Mr. LABRADOR. Thank you, Mr. Chairman. And that was Reagan's worst mistake as a President. So I think we wouldn't have

****Note:** The material submitted by Ms. Lofgren is not printed in this hearing record but is on file with the Subcommittee. Also, see Lofgren submission at:

<http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104663>.

the problem that we have today if Reagan had not done that. And I think if he were here today he would say the same thing.

So thank you, Mr. Chairman.

Thank you to the witnesses for being here today.

This Task Force is engaged in very important work and I'm encouraged by the discussion. I wish we would broaden it just a little bit, because I think, Mr. Lazarus, you and I may agree on something. I think Congress has failed to be specific in what the executive should do and should not do.

I disagree with your interpretation of prosecutorial discretion, but I completely agree that sometimes Congress has punted and has given the executive too much authority. And I think it's pure laziness. It's just we don't want to write precise laws, so we write these broad laws and then we give the executive all this power, all this authority.

And I hope that we get to that issue some time in this Task Force, because we're going to fight all day about whether the President did something right or wrong pertaining to immigration and pertaining to the health care law. But we can agree that, if we were more precise in our writing and we were more precise in our orders to the executive and our guidelines to the executive, we wouldn't be giving all this prosecutorial discretion, all this discretion to all these individuals.

Now, I ran for Congress after actually seeing President Bush's flagrant examples of overreach in some of his signing statements. So as a Republican, I was dumbfounded and it was abhorrent to me that the President was not following. And many of my friends on the left, they were with me, they actually disagreed with President Bush and they looked at what he did as something that was taking away from the power and authority that Congress has.

It shocks me every single time we have one of these hearings and I don't hear a single Democrat go after the President for his executive overreach. And it actually saddens me because I thought we were more honest than that. And I have been upset with my own party when we have done it, and it really saddens me to never hear one single Democrat, not one, say, "You know what? Maybe we should reconsider the executive overreach of this President."

They are okay when it is their goose that is being cooked, but they are not okay when it is our goose. When we are getting what we want, they are not okay with it. But they seem to be okay with it when they're getting what they want.

And what that means is that there is no real respect for the powers and authorities that we have here in Congress. There is no real respect for the Article I authority that we have been given, it really is just a political football, that when Republicans are doing it, then we're going to defend it, when Democrats are doing it, they are going to defend it. And I hope we get beyond that.

With the constant contradictions between current law and executive actions, it is not surprising that immigration enforcement is weak. Moreover, this continued overreach provides a concerning precedent for future Administrations to act. Imagine what a President Trump is going to do with the precedent that this President has set forth. He's already told us that Congress doesn't work. He's

already told us that he doesn't need Congress to act. Imagine what he would do.

And I want to see—I hope that they are consistent when a President Trump does the same thing that a President Obama does and that they actually say it's okay because they have prosecutorial discretion. I know they won't be consistent, but I hope that they can be consistent with this.

Mr. Blackman, do you believe that there is a difference between prosecutorial discretion and the President's executive action on immigration?

Mr. BLACKMAN. Yes, sir, absolutely.

With respect to prosecutorial discretion, on a case-by-case basis the President can make a decision on the merits of whether someone is warranting this treatment.

What DACA and DAPA do is set a classwide basis. For example with DACA, nearly 97 percent of the people who are eligible and applied got it. The government could not identify a single case, not one, where a person was denied for discretionary reasons. To this day they still can't deny one.

This it is not prosecutorial discretion. This is an exercise of a categorical blanking, a categorical suspension of the law to an entire class of people.

Mr. LABRADOR. Should this or any other Administration unilaterally decide which immigration violations are a priority for enforcement and which are not?

Mr. BLACKMAN. There is no problem with a prioritization, let me make this point clear. Texas has never challenged a prioritization. What they have challenged is the decision to categorically grant work authorization between an entire class of people who really are contrary to the will of Congress. The President—this Congress considered the DREAM Act. Congress said no. And the President decided these people are still warranting of this treatment.

Mr. LABRADOR. All right. Thank you. I yield back.

Mr. KING. The gentleman returns his time.

The Chair would now recognize the gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Mr. Chairman, thank you so very much.

Thank you to the witnesses.

Although I will ask for a moment of silence in the full Committee, I did not want the first Judiciary Committee that I was attending to not go without mentioning the tragic loss of Tiffany Joslyn, that many of you know was the deputy chief counsel of the Judiciary Committee on the Democratic side, in a tragic car accident 1 week ago Sunday, that lost the only two children of her family, of her mother and stepmother. That is, she and her brother were lost in the accident at the same time.

I hope that when we convene as a full Committee—I will not be here tomorrow, I will be attending her wake services—that we'll have an opportunity for a moment of silence.

Thank you, Mr. Chairman, for allowing me to make mention of that.

Let me proceed with the questions to the witnesses and let me thank you for those. It is obvious that we have much to agree on in this Committee and we have much to disagree on. I'd offer to

say that as we proceeded in this Committee of Executive Overreach, and I'm very glad to be on it, I still think that majority has failed to reach out or obtain any direct information or witnesses from the affected health care exchanges or immigration agency tasked with implementing the program.

We know the Supreme Court has already ruled on the constitutionality of the Affordable Care Act and the issues for today are now established law. So let me proceed. In addition, it is well to acknowledge that the executive orders regarding DAPA have been stayed, but as we know, when the Affordable Care Act and aspects of it were litigated it was found to be unconstitutional.

The staying of this district court action does not mean that we have yet fully litigated the President's authority. So that would be my line of questioning.

I know that there is also a district court proceeding where one aspect of it was found that the Congress did not have standing and the other aspect dealing with the appropriations part—and I'm saying this to you, Mr. Lazarus—was found to have—the Congress was found to have standing. And I'm not going ask you about those court cases, but I'm just suggesting that there is a whole list of litigation pursuing the executive authority of the President or, might I say, the constitutional authority of the President.

Let me offer to say to you, Mr. Lazarus, I'm going to offer something that's far afield, but hopefully will lead me into my questions as my time runs. I'm reminded of history, and during the Civil War the fugitive slave law was still the law of the land. Lincoln chose not or did not care to enforce this law. Would it be your position that Lincoln's actions would be unconstitutional?

Mr. LAZARUS. It certainly wouldn't be. And I think that all Justice Departments in all Administrations and scholars generally agree that a President has an independent obligation to evaluate the constitutionality of laws. At least in a case where an Administration conscientiously and carefully makes a determination that they cannot defend the constitutionality of a law, they have an obligation to do that.

Obviously, the Civil War is a rather exceptional set of circumstances, and actions that President Lincoln took to make it possible to prosecute the war, such as that one, might not be a precedent for taking similar actions under peaceful circumstances. But Presidents have that obligation, and as several people here have said, the Congress has an obligation.

Ms. JACKSON LEE. It is similar. Let me get two other questions. It is similar. And I thank you for that.

Let me quickly ask a question on DACA and DAPA. The President's critics have tried to score political points by quoting some of his oral arguments and comments and that he's contradicted himself. The President's critics have argued that he's abdicated his duty to enforce our immigration laws. Looking at removal rates under his Administration and legal precedent on abdication of immigration enforcement, are his critics correct?

And as I understand, the legislation allowed some—the latitude in discretion, I'd appreciate that, in the enforcement aspect of immigration laws.

Lastly, if I could quickly get in, Mr. Chairman, a question about the Affordable Care Act. In Mr. Blackman's testimony he alleges that implementing, the administrator made a variety of suggestions for statutory effective date. Does the executive branch have the authority to provide transitional relief when implementing legislation, ACA?

Two questions—if I could quickly, Mr. Chairman, be yielded to—for you to answer, one on the immigration latitude and one on transitional implementation latitude under Affordable Care Act.

Professor.

Mr. LAZARUS. On the immigration point, real quickly, I'd just like to point out that very prominent conservative legal scholars, prominent as scholars and as conservatives, who my copanelists are very familiar with, acknowledge that the executive branch has exceptional latitude to determine priorities and to exercise discretion in the case of immigration.

One of those is Jonathan Adler, who is a very prominent professor who all of us here know very well and respect a great deal, and who was actually a main architect of the *King v. Burwell* challenge. But he wrote on the Volokh Conspiracy, which is a leading conservative blog, basically expressing great skepticism about the legal challenge to DAPA, as did Ilya Somin, who is another very prominent conservative and very fine professor. Both of them just acknowledge that immigration is special and has special discretion.

As far as phasing in is concerned of the Affordable Care Act, I don't know what else there is to say. Most of the adjustments that my friend Professor Blackman is objecting to are history. I mean they've already happened. They were done on a temporary basis. They're old news.

And the big news is that the Affordable Care Act is being implemented very successfully. Tens of millions of people now have access to health care who didn't have it before. As the Hospital Corporation of America said in its amicus curiae brief in *King v. Burwell*, the Administration is implementing the Affordable Care Act as Congress intended and it is having effects that give more access and also make it possible for providers like the Hospital Corporation—

Mr. KING. The gentlelady's time has expired.

Mr. LAZARUS. So in any event, that, I think, is the answer.

Ms. JACKSON LEE. I thank you.

Mr. KING. I think the gentlelady.

And the Chair would recognize the esteemed gentlemen from South Carolina, Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman.

Ms. Slattery, I listened carefully as Professor Lazarus was asked the limits of prosecutorial discretion and I did hear him make a series of arguments about statutory construction. I did not hear him address the constitutional implications of prosecutorial discretion and what limits, if any, may exist. So I thought I might take my chances with you.

Can you tell me what are the limits, if any, on this thing my friends on the other side call prosecutorial discretion?

Ms. SLATTERY. Well, I don't think there are any hard and fast limits, you know, set in the Constitution, of course, not many that

have—much guidance that has come from the Supreme Court on this. But certainly as one of my copanelists mentioned, prosecutorial discretion does not allow the President to exempt entire classes of individuals, it shouldn't allow that. That should be at a minimum outside of the scope of that discretion.

Mr. GOWDY. Do you think the power emanates from his ability to pardon after the fact? What's the constitutional origin of prosecutorial discretion?

Ms. SLATTERY. I think it's inherent in his duty to take care that the laws be faithfully executed, you know, it says faithful—take care to faithfully execute the laws. It doesn't just say shall execute all laws. So it is inherent, particularly given the scope of—

Mr. GOWDY. But if I accept that theory, take care that the laws be faithfully executed, the use of the article, or the word "faithfully" seems to minimize the duty to take care that the law be executed. If I were to accept that theory, then "faithfully" is a limiter. And I view it differently. I view it as more of an exclamation point that we really, really mean that your job is to make sure that the laws are executed.

I want to ask you about this fact pattern. Are you familiar with the case *Zadvydas*? Are you familiar with that case in the immigration context?

Ms. SLATTERY. No, I'm not.

Mr. GOWDY. Well, I'm going to butcher this, but I am going to give it a try anyway. And I'm sure one of the professors will do like they did in the past and correct me if my factual summary is wrong.

Zadvydas is a Supreme Court case where the government cannot indefinitely detain convicted criminals who have finished serving their time but the host country will not take them back.

So think about the worst host country you can. Let's think about what used to be Somalia. We have someone from Somalia who commits, let's say, murder in the United States and he or she serves the sentence and they are supposed to be removed, but Somalia won't take them back. So guess what happens? They're released. They can't gain lawful entry into the country, but we're going to release them into the very same country that they couldn't gain lawful entry into because the Supreme Court, in a 5-4 decision, doesn't think you ought to be able to indefinitely detain criminal aliens who have finished their sentence.

You with me so far factually?

Ms. SLATTERY. Yes.

Mr. GOWDY. All right. What if a President King, God forbid, but what if a President King were to decide that he doesn't like that law?

Mr. ISSA. All in favor of God forbid.

Mr. GOWDY. He doesn't like that law so he is going to not prosecute anyone in the penal system for false imprisonment, for violation of 1983, he really thinks you ought to be indefinitely detained and not released back on the innocent public? Can we do that if Republicans were to somehow retake the White House? Can we decide we're not going to enforce that law?

Ms. SLATTERY. I think that's certainly a tough situation, and I would hope that the President would work with Congress to change the law.

Mr. GOWDY. Well, that was the Supreme Court that did it and they're tough to work with. You got to wait till one of them retires.

Ms. SLATTERY. That is certainly a difficult situation, and I'm certainly not ratifying or endorsing what President Obama has done. And I think that clearly his interpretation of prosecutorial discretion is very broad.

Mr. GOWDY. It's a little closer to anarchy than it is prosecutorial discretion. And I don't say that to be hyperbolic. The reality is this. Today it's immigration laws—actually, it's not just immigration laws, it's also mandatory minimums in drug cases, it's the so-called Affordable Care Act. Tomorrow it might be election laws, it might be discrimination laws, it might be some other category of law that he's waited a couple of years for Congress to act on, but Congress has not acted in the time period that he thinks that they should, so he's just going to do it summarily.

I'll just caution—I know I'm out of time, Mr. Chairman—but I'll just caution my friends, you may like the use of prosecutorial discretion today; you will really not like it at some point. So this notion that we're going to conflate the episodic use of discretion to not prosecute a case with the wholesale announcing ahead of time that we're not going to prosecute certain broad categories of cases, I promise you there will be come a day where you cry out for the law to be executed and I hope I live long enough to see it.

I will yield back to the Chairman.

Mr. KING. I thank the gentleman from South Carolina.

I now recognize the gentlelady from California, Ms. Chu.

Ms. CHU. Mr. Lazarus, I support the President's proposal to and decision to expand DACA and to expand the program to DAPA. When implemented these actions would mean that families could stay together and immigrants could continue to work and contribute to our economy with dignity without the fear of deportation.

And the reaction from the community is strong as well. In fact, in an immigrant workshop that I had in LA, I had the opportunity to meet remarkable people like Andrea, who was a graduate from her high school, at the top of her class, the first member in her family to attend college. And as a DACA recipient, Andrea can work toward her dream of becoming a teacher. Because of people like Andrea, it was even more heartbreaking when the courts prevented DAPA and the expanded DACA program to go into effect.

Now, Mr. Lazarus, the majority wants us to believe that there is no difference between Andrea and a hardened criminal. Under what authority does the executive branch have to prioritize the removal of criminals over children and their families?

Mr. LAZARUS. Well, that's very good, and obviously we all understand that there is a difference between the person with whom you were talking and a hardened criminal, and the law does too. And so the fact that the President in DAPA has simply codified that difference is only reflecting a practice that was a sensible and appropriate practice and had to be engaged in because, as several people have pointed out, Congress has not appropriated anywhere remotely enough funds to deport every undocumented person.

And I just want to mention, since it's been said that the President is somehow making all these things up, on the point that you raised, the House report accompanying a relatively recent DHS appropriations bill specifically instructed DHS not to "simply round up as many illegal immigrants as possible, but to ensure that the government's huge investments in immigration enforcement are producing a maximum return in actually making our country safer."

So the DAPA priorities are just what Congress has directed and endorsed and quite appropriately so.

And I also want to make another point, although Congressman Gowdy is no longer here. Several people have said that there's a difference between case-by-case discretion and singling out classes of people for discretionary and it isn't amnesty, it is temporary nonremoval.

When Congress passes a law, as it did in the Homeland Security Act, directing the Department to establish priority—enforcement policies and priorities, it is telling the Administration it is your responsibility to establish priorities. Priorities, Professor Blackman, means you've got to identify groups of people who get priority enforcement and who do not get priority enforcement. So that's where that authority comes from.

Ms. CHU. And let me follow up on that case-by-case issue. Of course Judge Hanen halted the expansion of DACA and the DAPA program because he believed that the original DACA applications were not being adjudicated on a case-by-case basis and other programs' guidance instructs USCIS officers to use their discretion and make decisions on a case-by-case basis. And the fact that there was a 95 percent approval rate, he says, says that—he said that they weren't actually reviewing the case individually.

Why do you think applications have been approved at a 95 percent rate? And does this mean that the cases were not being adjudicated on a case-by-case basis?

Mr. LAZARUS. Well, I think it's been pointed out by a number of experts that the way DACA set distinctions between those who would be eligible and who would not be eligible, people who thought that they might not be determined to be eligible were not going to apply. Because once they have applied they are now known to DHS. So everybody who applies for deferred action under either DACA or DAPA is taking a huge personal risk and therefore they are going to be very cautious about applying.

My understanding, I'm not really an immigration policy expert, but my understanding is that the bar was so high in DACA that it is perfectly expectable that everybody who did apply or most people who did apply would qualify and that may not be true under DAPA, from what I understand.

Ms. CHU. Thank you. I yield back.

Mr. KING. The gentlelady yields back.

The Chair now recognizes the gentleman from Michigan, Mr. Bishop.

Mr. BISHOP. Thank you, Mr. Chairman.

And thank you to the panel for being here today.

Before I was elected to Congress I had the opportunity to practice law. And as a part of that practice I taught a class at the local

law school, third-year-level class that really looked back on legislative process and the historical precedent of legislative process.

I gave the students one responsibility when they first started and that was to explain the role of each branch of government and then to give me the derivation of that power for each one of those branches. Where did they get their power from? And the rest of the class was spent on that process, of Article I and Article II in particular.

But I now look back having now been serving in Congress now for my first term, I feel like I should go back and round them all up and reteach the class, because I have completely missed the mark on what legislative process is all about, especially in Congress. And I have never seen so many acronyms, so many boards, so many delegations of nondelegable power ever. And it concerns me that we have a situation where the tail is now wagging the dog and it leaves Congress powerless.

I want to raise to your attention, we just were talking about immigration, let me take you to another issue altogether. This is one that illustrates my concerns. The Independent Payment Advisory Board, or the IPAB, is a new executive branch agency created by the President's healthcare law. The law empowers the Board of 15 unelected officials with the authority to reduce Medicare coverage for seniors. Unless overturned by a supermajority of Congress, the recommended cuts dictated by this Board will become law.

Bipartisan concerns have been raised regarding several aspects of this board. While the proponents claim that beneficiaries will be held harmless from the Board's decisions, how can the IPAB impose sharp cuts to providers without any adverse impact on their patients?

Furthermore, according to Medicare's former chief actuary, Richard Foster, the healthcare law will pay doctors less than half of what their services cost at the end of the decade and down to 33 percent in the decade ahead. Foster also warns that these cuts are driving Medicare providers out of business and resulting in harsh disruptions in quality and access for seniors.

We can all agree that Medicare does need to be put on a budget, there is no question about that, to save the program in the long run, but it should not be done by a group of unelected, unaccountable bureaucrats which have the ability to endanger the beneficiary for which the program was intended to benefit.

I don't know who to address this to. This is one of those questions that could take the whole time because I just don't understand how I can get an adequate answer on this.

But, Ms. Slattery, given their unprecedented new power over Medicare, to whom are the 15 bureaucrats accountable? Because I know it is not to us.

Ms. SLATTERY. That's an excellent question and it really turns the Founder's intent on its head. They vested the lawmaking power in Congress because Members of Congress would be closest to the people, and the people could express their displeasure with bills that are passed either by complaining to their Members or voting them out. So this Board is certainly a problem from that perspective, and it's my understanding that there is currently at least one lawsuit pending in the courts to challenge its constitutionality.

Mr. BISHOP. Indeed. Thank you.

Mr. Blackman, I have a question for you too. You can answer that question as well, but I'm wondering if you can tell me whether or not this power is delegable in the first place.

Mr. BLACKMAN. So, unfortunately, the lawsuit was dismissed because it wasn't ripe against the IPAB. The court said it hasn't gone into effect yet, so come back later.

The broader question is one of delegation. This is one that's been raised many times. The take care clause, take care that laws as faithfully executed, that means the executive has the executive power, not the legislative power. And to the extent that the President's exercising legislative powers or to the extent that Congress is delegating away its legislative powers is a serious breach of the separation of powers which this body must take steps to remedy lest they give up their constitutional prerogatives.

Mr. BISHOP. Anybody else want to chime in on that subject?

I thank you for your time. It's a big subject. I appreciate your input. Thank you.

Mr. KING. The gentleman yields back.

The Chair now recognizes the gentleman from California, Mr. Peters.

Mr. PETERS. Thank you so much.

I appreciate the witnesses here. I guess just to follow up on my colleague's comment about the President's healthcare law, the President's healthcare law was passed by Congress. And actually the particular thing you referenced, the gentleman referenced, is not one of my favorite aspects of it, but it was explicitly passed by Congress. So Congress decided under the President's signature to give up this power. You can't blame the President, I think, for that. That was the Congress' act.

Mr. BISHOP. Will the gentleman yield?

Mr. PETERS. No, I only have 5 minutes. I have to ask about something else.

Mr. BISHOP. Well, you are not being honest with that statement, and if you are going to say that, you ought to give me—

Mr. PETERS. All right, I'll yield. Go ahead.

Mr. BISHOP. I was not saying—first of all, I was not here when that law was passed.

Mr. PETERS. Nor was I.

Mr. BISHOP. And I was merely suggesting that this was, in fact, something that was not delegable, and I want to find in the law where we do delegate that power. The fact that it was delegated does not mean it was authorized by law. In fact, it was not.

Mr. PETERS. Reclaiming my time. I guess that I would, with respect, suggest that that's a question for the Court to answer. But I wanted to make the point that it was Congress that explicitly voted on this, that was not something that the President did, and that was my only point.

The American Action Forum estimates it would take 20 years and cost between \$400 and \$600 billion to deport all the people who are here without documentation.

Mr. Lazarus, do you think there's a duty by Congress to appropriate that much money to enforce this law?

Mr. LAZARUS. Congressman, I'm sorry. I didn't quite understand the question.

Mr. PETERS. Do we have a duty to appropriate all the money it would take to deport all these people who are here, as some say, illegally?

Mr. LAZARUS. No, I certainly don't think so.

Mr. PETERS. Right. So the answer is kind of obvious. What we do is we—I think we—if Ms. Lofgren's previous comments are right, 4 percent, about \$1.2 billion—

Mr. LAZARUS. Probably high, actually.

Mr. PETERS. What we do is we tell the President, here's the amount of money that we want to—you know, we don't want to spend more on deporting these people than we do on transportation, for instance. We are going to give you \$1.2 billion. You figure out the best way to enforce the law given that budget. Isn't that what we do?

Mr. LAZARUS. Yes, but I also think—that is true, but it's not as if the President makes up what the enforcement priorities are going to be out of thin air.

Mr. PETERS. Right.

Mr. LAZARUS. The priorities that are reflected in DAPA are commonsense priorities. They've been developed over decades. They've been developed, as I said, in a dialogue that's ongoing between Congress and the immigration enforcement officials and the Department, and they are sensible priorities. Nobody really disputes them. I think a number of Members have already said that.

So saying that the President is running around making things up and so forth and exercising huge amounts of untrammelled discretion just is really not accurate.

Mr. PETERS. Right.

Mr. LAZARUS. These are commonsense priorities. Congress has said, as you just said, we're going to give you this much money, we want you to figure out what the priorities are, but we're going to give you a lot of guidance as to what we think they should be.

Mr. PETERS. Right. And then also someone used the term looking in the mirror. I would just say that in 2013 the Senate passed a bill 68-32, with significant bipartisan support, not just one or two people, not just eight people, as someone referred to the Gang of Eight, that included a lot of things that would deal with the immigration law, give Congress the chance to deal with it.

The Senate passed it. We never even got a vote on it. So all of us may have different views about what the right answer was. We never even took it up in this House of Representatives. We were not allowed even to talk about it. And yet we sit here and complain that the President has taken on too much power.

That would have provided a 13-year path to citizenship, if you were in the U.S. before 2012, had no felony, had a job, paid a \$500 fine, application fees, all back taxes, would have provided a legislative pathway to citizenship for DREAMers if you were in the U.S. before 16, high school degree, had been in the U.S. for 5 years.

E-Verify, which is something that a lot of folks have been calling on to make sure that we are getting enforcement. Would have allowed a greater number of H-1B visas for highly skilled workers, which a lot of us agree on. And it would provide substantial border

security, \$46 billion in improvements, 38,000 border security agents on the Mexico border, a 17,000 increase, 350 miles of new fencing, new technology cameras, ground sensors, radiation detectors, drones, helicopters, and electronic exit checking at air and seaports.

All of this was before us as a legislature. And if we want to know what the problem is, it's not down the street. It's in the halls of the United States Congress.

I yield back.

Mr. KING. The gentleman returns his time.

The Chair would now recognize the patient gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman. And I apologize for not being here at the opening bell. I was sitting next to Chief Justice Roberts for my twice-a-year opportunity to talk about the organization of the courts and the like. So you were my second choice, trust you.

But this has been a very, very interesting dialogue, and I think I've been here for most of it and enjoyed it, and it's caused me to perhaps change slightly the questions I'm going to ask.

And, Professor Blackman, let me ask you a question, because you and Mr. Lazarus have had quite a good time agreeing to disagree, but I think there's two interesting points. Justice Roberts, siding in the majority—oh, by the way, when you teach law, do you teach that Justices are partisans, that one's a Republican, one's a Democrat?

Mr. BLACKMAN. I do not, sir.

Mr. ISSA. So Mr. Lazarus' claim that it was bipartisan would be a little inconsistent, perhaps, with what most law schools are taught about Justices and Federal judges, that regardless of who appoints them, they are truly nonpartisan once they get to the court. And we certainly have proof historically that who appoints you doesn't necessarily dictate how you vote.

So I just want to make that clear, because I know Mr. Lazarus didn't mean any disrespect from it. But we are a very partisan group here, and every 2 years we're reminded. As a matter of fact, today we're seeing one of the Gang of Eight have a very different outcome in Florida in the Presidential primary than we would have otherwise have seen, undoubtedly, if he hadn't helped authored the piece of legislation that didn't go anywhere in the House.

But I want to get back to that original intent. Justice Roberts, in good order, believed that what he was doing is looking at the full statute and the intent. And I was here for that, and I voted no. Those who were here and voted yes clearly, I believe, wanted the provision that they now have. So even though they talked about it, said they didn't, they wanted it.

So Justice Roberts has, in fact, in siding with the majority, given them what Democrats wanted in the Affordable Care Act, which was somehow, some way, they would fund everything.

And so my question to you is, if that's the case—two-part question for your future law students—one is, if we take that, does that mean that language doesn't have any particular matter as long as we knew what they were trying to achieve? In other words, what the politics of the majority were versus what they actually are able

to get their own members to agree to? And let me—okay. And then I'll follow up.

Mr. BLACKMAN. Yes, sir. My students are on spring break right now, but they'll be listening to this question next week.

So the short answer is the Chief Justice's decision rewards a lazy Congress, is a phrase we've used very often. If Congress doesn't want to call it a tax because it's unpopular, call it a penalty and we'll uphold it as a tax. If Congress doesn't want to take time to read a 3,000-page bill and they omit a few words here and there, don't worry about it, we'll save you on the back end.

One of the themes of our discussion today is how when the courts back up a lazy Congress, it encourages Congress to be lazier. This body can be more vigorous, not lazier.

Mr. ISSA. Now, let's go through the same thinking, though. In that same piece of legislation, Members of the majority who were pro-life had a bargain that abortion not be mandated by this act in the funding of abortion. Bart Stupak and others clearly had agreed to that. But the Court apparently did not agree with, if you will, the minority of the majority—agreed with the minority of the majority, rather than the majority of the majority in this case. In other words, the compromise necessary to get that legislation did include an exclusion of abortion.

The President immediately began mandating abortion payment in the healthcare portion of the—you know, you have to pay for prescriptions—but the Court went the other way.

So how do you—and maybe, Ms. Slaterry, you would be helpful in this—how do you reconcile that the same Court, looking at the same majority and the same majority intent, allowed an abuse of the words of it in one case but not in another case?

Ms. SLATTERY. You know, that's a difficult question and—

Mr. ISSA. Because we're here to talk about overreach, and in both cases, the President got something—was getting something that he didn't have in the letter of the law, but the Court ruled completely differently in two cases related to the same law.

Ms. SLATTERY. It highlights the problem of Congress and the President, rather than trying to settle these disputes outside of court, leaving it up to the determination of nine Justices, or eight Justices as we currently have.

And I would say I agree with the Court's decision in the *Hobby*—

Mr. ISSA. *Hobby Lobby*.

Ms. SLATTERY [continuing]. The *Hobby Lobby* case that you referred to, which was a 5-4 decision, and I disagree with the *King v. Burwell*, the more recent decision. You know, it's hard to reconcile how a particular Justice votes in any particular case.

Mr. ISSA. Okay.

Mr. Chairman, I would presume I could have a little more time, sort of my own second round? Would that be okay?

Mr. KING. I hear no objections.

Mr. ISSA. Thank you.

Well, I want to move now to another case. And, Mr. Lazarus, I'm going to also want to let you in on this one, and you can comment on the other one if you'd like.

In the case of former Federal worker Lois Lerner, after multiple Committees evaluated the Administration's use of the IRS to essentially stop conservative groups on and before the 2012 election and the abuse thereof, the Ways and Means Committee, the Committee of jurisdiction over the IRS, referred to the U.S. Attorney's Office a criminal prosecution. And in that criminal prosecution, I think pursuant to 18 U.S.C. it said that the U.S. Attorney for the District of Columbia shall present to the grand jury.

What part of discretion or cost analysis allowed the U.S. Attorney, upon orders directly or indirectly of the President, to simply disobey it and return a letter that said: We think it was mismanagement; therefore, we shall not do what the law says we shall do.

Mr. LAZARUS. Thank you. First of all, I would just like to acknowledge a fair criticism of my bipartisan characterization. Judges and Justices certainly shouldn't think of themselves in partisan terms, and most of them most of the time certainly do not do so. Chief Justice Roberts has expressly stated his concern about the polarization of the political branches spilling over and affecting the Court. So you were right, I shouldn't have said that, and I didn't mean it.

Now, with respect to your question about prosecutorial discretion in the IRS—

Mr. ISSA. In the criminal referral by the Ways and Means Committee pursuant to the law.

Mr. LAZARUS. You know, this is not a subject in which I—it's not just that I'm not an expert, it's that I barely know very much about it at all and you know a great deal. So I really, you know, don't want to say anything really about the facts in that case.

The question of prosecutorial discretion that you were raising, I think is a legitimate legal question, and there may be other members of the panel who know more about this than I do. If Congress orders the executive branch, the Justice Department, to actually prosecute a case, I would think—and, again, I'm not really an expert here—I would think that that actually does raise a question about congressional encroaching on inherent constitutional executive branch authority to make those kinds of decisions in the end by itself. I'm not saying I know the answer to it, but—

Mr. ISSA. Well, let me follow up with that, because right here, sitting almost where you're sitting, the former Attorney General, Eric Holder, sat and said to me—actually, it was last Congress, I was sitting over there—and he said: I wear two hats. And it's an interesting point, because he wears one hat, which is he's a political appointee serving at the pleasure of the President, and that makes him a partisan Democrat, clearly. But he also wears the hat of the law, the highest law enforcement official, which is really not an executive branch position. That position is much more one that belongs as the input to the third branch of government.

So under current law, whether it's constitutional or not, we have given ourselves the ability to take to the court certain things. One of them, by the way, is impeachment. We have a process, obviously, and we can remove anyone in the executive branch—well, almost anyone—and we have that. And, of course, we can demand that the court hear it.

Under the law, there's no prohibition on Congress bringing to the court a case. As a matter of fact, it's constitutionally provided for in the case of impeachment. For decades, we have had the ability—actually, I think many, many decades—the ability to refer a criminal prosecution with that statute that says: and shall present to the grand jury.

Now, we don't say shall present with all of his powers and best case. You know, we presume that the U.S. Attorney shall present it in a reasonable fashion to a grand jury.

We, I believe—and I'd like Professor Blackman and others comment in closing—I believe that, in fact, that maintains a separation of power, that although we're insisting that it be presented as we would say, that you must prosecute a certain category 100 percent, which we would have the ability to do, discretion is not something that the executive branch gets. It's something that they may have, if there's ambiguity or limited resources.

In this case, they had all the resources to prosecute Lois Lerner. They had a grand jury. And they didn't say anything except that they thought they shouldn't do it in spite of the fact that the statute—and they didn't object to the constitutionality. They simply decided that—and this is why it's here at Overreach. If the Administration, as Chairman Gowdy said, if the Administration decides that they shall not prosecute in the case of DACA, but they also shall not prosecute in the case of a statutory referral under a law that says, shall present to the grand jury, then what tool do we have left if, in fact, appropriation is ignored, because they do something without appropriated money, and that they don't just have discretion to not prosecute criminal aliens, but in this case they choose not to prosecute a statutory referral that says, shall?

So I listened for this whole time, and I heard the immigration issue endlessly, but I want to juxtapose it on a statute that says, shall, and they choose not to.

Mr. Chairman, you've been very patient, but I'd appreciate anyone who would want to answer.

Mr. KING. Yes. The gentleman's time is deemed expired, but the witness will be allowed to briefly and concisely respond.

Mr. BLACKMAN. Respectfully, sir, I have no knowledge on this issue, so I will pass. Thank you, sir.

Mr. KING. That's concise.

Hearing from no other witnesses, the gentleman from California returns his time.

This concludes today's—the gentlelady from Texas is recognized.

Ms. JACKSON LEE. Thank you.

I will not pretend to answer the gentleman's question, but I do think it lays on the table a moment for the minority to be able to respond. And I would only just say this. I brought up to Mr. Lazarus, and this is going to be pithy and concise, the fugitive slave law, and I would make the point that it represented sort of a blanket exemption. And the relevance of that, of course, to DACA and DAPA is that large classes of cases were exempted. So when the executive order is deemed unconstitutional, there's precedent that you can have an executive order that is widespread based upon interpretation, statutory and/or constitutional.

With that, however, let me indicate that I'd like to put into the record, Mr. Chairman, your courtesy, The Atlantic, "John Roberts Calls a Strike," and ask unanimous consent to put it into the record.

Mr. KING. The gentlelady has been recognized for a unanimous consent request. Hearing no objection, so ordered.

[The information referred to follows:]

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In 6-3 Ruling, the Supreme Court Upholds Affordable Care Act Subsidies - The Atlantic

The Atlantic

John Roberts Calls a Strike

The chief justice's opinion upholding Obamacare aims to fulfill his promise to serve as an impartial umpire.



A group of interns race to deliver the Supreme Court ruling in *King v. Burwell* to nearby network television crews on Thursday.

Joshua Roberts / Reuters

GARRETT EPPS
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TEXT SIZE



Chief Justice John Roberts tossed a bucket of cold water on the arguments against tax subsidies under the Affordable Care Act on Thursday, and the deadly threat to Obamacare melted away like the Wicked Witch of the West. Writing for a 6-3 majority, Roberts, like the consummate A student he is, offered an excellent third-year administrative law exam answer to the

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questions the challengers posed.

There had been speculation that the crucial votes to save the Act would come from Roberts and Justice Anthony Kennedy, and that they would have to be lured across the Court's liberal-conservative line by soothing words about the prerogatives of the states. But federalism was the dog that didn't bark Thursday.

Instead, Roberts wrote for himself and five others—Justices Kennedy, Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. The challengers had argued that one clause of the Act limited its tax-benefits to “an exchange established by a state,” and so the subsidies could not be offered to those who purchased their plans on state-level exchanges established by the federal government. Roberts explained in his customary breezy style that this clause, read in context, referred to all American Health Benefit Exchanges established under the act, whether by the states themselves or by the federal government.

This reading means that federal subsidies are available to all eligible Americans who comply with the Act's individual mandate by buying health insurance through an exchange. The contrary reading would have meant that those who did so in states that had not set up their own exchanges would lose their coverage, and very soon be forced to drop it. “So without the tax credits, the coverage requirement would apply to fewer individuals. And it would be a *lot* fewer.” Roberts cited figures suggesting that up to 87 percent of exchange customers would lose subsidies.

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He made clear as he did so that this reading was the correct one as a matter of law—not an administrative interpretation that could be changed by a hypothetical Republican administration. In other words, for better or worse, the ACA is now part of federal law, to be uprooted, if at all, only by a full congressional vote to repeal and, possibly, to override a presidential veto.

Roberts also refused to duck responsibility for making an interpretive choice, rather than simply following the words of the statute. Both parties before the Court—the right-wing challengers represented by the conservative attorney Michael Carvin, and the federal government, represented by Solicitor General Donald Verrilli, had argued that the statute was *clear*. But it wasn't, and Roberts said so. The phrase “established by a State,” he wrote, could mean either “*such* exchange,” state or federal, or “only a state exchange.”

It takes nothing away from Roberts's legal and literary skills to say that, once that was established, the result flowed naturally. Because if the pl [previous](#) [next](#) ►

ambiguous, it is hornbook law that courts should interpret ambiguous provisions in their context and in line with the most reasonable view of congressional intent. “[E]stablished by a state” might seem clear “when viewed in isolation,” he wrote. But that “most natural reading” was foreclosed by “the context and structure of the Act.”

Roberts read the statute in a broad context indeed, including the history of healthcare policy and the legislative process that produced the ACA. Massachusetts had the first successful state healthcare plan, he noted. The three reforms at the heart of its plan are a ban on insurers refusing coverage or raising rates on individuals on the basis of their health; an “individual mandate” that all taxpayers secure coverage; and tax credits for those who otherwise could not afford coverage.

Those reforms are at the heart of the ACA as well. If the Court agreed with the challengers, the gap between states operating state exchanges and those

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without would be huge: “only one of the Act’s major reforms would apply in States with a federal Exchange.” That’s because without the tax credits, lower-income taxpayers would get a “hardship” exemption from the “mandate.” Only the insurance reforms requiring companies to insure the sick as well as the healthy (“guaranteed issue”) would apply—and the experience of the states shows that guaranteed issue in isolation leads to a “death spiral.” Customers wait to get sick before buying insurance; companies, saddled with only the bad risks, must jack up rates; and then the private insurance market contracts or even collapses.

“It is implausible,” he wrote with some understatement, “that Congress meant the Act to operate in this manner.”

Roberts had kind words for the challengers. Their argument, he wrote, is “strong,” and the Court should be wary when relying “on context and structure in statutory interpretation.” The Act itself, he wrote with even more understatement, “contains more than a few examples of inartful drafting.” He likened its passage to an old cartoon once cited in a law review by the late Justice Felix Frankfurter, “in which a senator tells his colleagues, ‘I admit this bill is too complicated to understand. We’ll just have to pass it to find out what it means.’” But he concluded: “We must respect the role of the legislature, and take care not to undo what it has done.” The ACA was passed “to improve health insurance markets, not to destroy them.” And with that, the witch was gone.

But not without a heartfelt eulogy from Justice Antonin Scalia, dissenting for himself and Justices Clarence Thomas and Samuel Alito. The words “established by a state,” he wrote, are the only words that count. “The Secretary of Health and Human Services is not a state. So an Exchange established by the Secretary is not an Exchange established by a state—which means people who buy health insurance through such an Exchange get no

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money" from tax credits.

Scalia's dissent is striking for two reasons. Though pointed, it is, like his dissent Monday in *Los Angeles v. Patel*, more restrained than the usual aria of Scalian outrage. Second, I think, it works against itself, leaving the reader more convinced than before that Roberts has read the statute right.

His first argument, as noted above, was that of a fundamentalist preacher with a proof text: "established by a state" cannot mean anything else. Context is irrelevant; dictionaries are all that matter.

His second is that the Chief's use of other provisions to justify a more inclusive reading are wrong. But this passage is grotesquely unpersuasive. Roberts pointed out that if federal exchanges are read out of the subsidy provision, this renders absurd provisions instructing the federal government to provide federal-exchange consumers with online calculators of their subsidy; to conduct outreach to federal-exchange customers to tell them about their tax credits; and to provide reports on the number of policies sold and the subsidies provided.

Nonsense, Scalia insisted: "What stops a federal Exchange's electronic calculator from telling a customer that his tax credit is zero? . . . What stops a federal Exchanges outreach program from fairly and impartially telling customers that no tax credits are available? . . . What stops a federal Exchange from confirming that no tax credits have been paid out?"

What stops the Court adopting those ridiculous suggestions? The answer, to me, is the simple refusal of six justices to believe that $2+2=0$ just because part of the American conservative movement would really, really, really like that to be the case.

That refusal was wise. This result is best for the country, and for the Court.

<http://www.theatlantic.com/policy/archive/2015/06/roberts-scalia-affordable-care-act-king-surveil/396693/>

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Roberts will endure a fresh torrent of abuse from conservatives who regard him as an apostate; but the evidence so far is that he remains sunny in outlook and determined to read the law as he sees it. This result is best for him as well.

His readings, whatever you may read in the hours and days to come, are overall quite conservative. But the dispute between Roberts and his usual allies reminds me of a statement Scalia himself made in 1997: "I am an originalist. I am a textualist. I am not a nut."

The far right offered the Roberts Court a chance to do something that would have been, under the eye of history, nutty and dangerous. On Thursday, the majority refused that invitation.

ABOUT THE AUTHOR



GARRETT EPPS is a contributing editor for *The Atlantic*. He teaches constitutional law and creative writing for law students at the University of Baltimore. His latest book is *American Justice 2014: Nine Clashing Visions on the Supreme Court*.

Ms. JACKSON LEE. Thank you so very much.

Mr. KING. The gentlelady returns her time.

This concludes today's hearing.

Thanks to all the witnesses for attending. Without objection, all Members will have 5 legislative days to submit additional questions for the witnesses or additional materials for the record.

I thank the witnesses, the Members, and the audience. This hearing is adjourned.

[Whereupon, at 12:17 p.m., the Task Force was adjourned.]

